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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. _____

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
10/19/2021
DEANA WILLIAMSON, CLERK

_____

HAROLD GENE JEFFERSON,

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

On Petition for Discretionary Review from the Eleventh Court of Appeals in Eastland, Texas,

Cause No. 11-18-00184-CR

PETITION FOR DISCRETIONARY REVIEW

Submitted by:
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RESPONDENT
The State of Texas

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STATEMENT REGARDING ORAL ARGUMENT

Appellant has raised in his first ground an important question of first impression in this Court and believes that oral argument would help clarify the issues presented in his petition for discretionary review. Therefore, he respectfully requests oral argument.

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

NOW COMES, **Harold Gene Jefferson**, Appellant in this cause, by and through his attorney of record, **Jacob Blizzard**, and, pursuant to Tex. R. App. P. 66, *et seq.*, moves this Court to grant discretionary review, and in support shows as follows:

STATEMENT OF THE CASE

Appellant Harold Gene Jefferson was originally indicted on one count of Sexual Assault and one count of Indecency with a Child by Contact. CR 11-12. Following the State's granted Motion to Amend the Indictment, Appellant was charged with two additional offenses of Sexual Assault of a Child by Contact. A jury convicted Appellant on all counts and assessed punishment at 35 years on Count 1; 45 years on Count 2; 45 years on Count 3; and 25 years on Count 4. CR 42-50; CR 89-96.

STATEMENT OF PROCEDURAL HISTORY

Appellant presented two issues in his brief filed on July 12, 2019. His conviction was affirmed in an opinion not designated for publication. *See Jefferson v. State*, Cause No. 11-18-00184-CR, 2021 Tex. App. LEXIS 4843 (Tex. App.—Eastland June 17, 2021); *see also* Appx. A. Appellant filed a motion for rehearing on August 2, 2021, which the 11th Court denied on August 5, 2021. *See* Appx. B. Appellant filed a Motion to Extend Time to File this petition on September 7, 2021,

which was granted. This petition is due to be filed on October 18, 2021 and therefore, is timely filed.

GROUNDS FOR REVIEW

GROUND I: The 11th Court of Appeals erred where it decided an important question of state law, specifically what constitutes an "additional or different offense" in the context of Texas Penal Code section 22.011 (a)(2), based on erroneous statutory interpretation that conflicts with decisions of the Court of Criminal Appeals.

ARGUMENT

A. While this Court has not decided Appellant's precise issue—whether sections (a)(2)(C) and (a)(2)(E) of Texas Penal Code section 22.011 are different offenses to trigger Article 28.10(c)'s indictment rule—its related rulings provide the necessary guidance that the 11th Court should have relied upon in its analysis of the same.

In the fourth subpoint of Appellant's first presented issue, he questioned: "Whether Appellant was denied effective assistance of counsel where trial counsel failed to object, preserve error, or otherwise contest the motion to amend the indictment?" To reach the ineffectiveness issue, the 11th Court had to first address the threshold issue of whether Texas Code of Criminal Procedure Article 28.10(c) was violated. In its brief analysis, the Court noted that under that article, an indictment may not be amended over the defendant's objection as to form or substance if the amended indictment charges the defendant with an additional or different offense. *See* Appx. A (Mem. Op., 9). Appellant's argument was precisely that—the State's motion to amend improperly charged him with two additional

offenses, and Trial Counsel was ineffective for failure to object as a result. *See* Appx. C (Appellant's Br., 18-20).

The 11th Court cited to *Flowers v. State* to define a violation of Article 28.10(c): if the statutory offense is changed, then a violation has occurred. *See* Appx. A (Mem. Op. 9); *see also Flowers v. State*, 815 S.W.2d 724, 728. . The 11th Court then cited to the unpublished *Duran v. State*, a 2008 case out of Amarillo, to counter that "at least one court of appeals" has determined that an amended indictment does not allege an additional offense in violation of article 28.10(c) if it merely adds another count of the same charged offense. *See* Appx. A (Mem. Op. 10); *see also Duran v. State*, No. 07-07-0110-CR 2008 Tex. App. LEXIS 2160 (Tex. App.—Amarillo Mar. 26, 2008, pet. ref'd).

Although it did not expressly say so, the 11th Court determined the latter was true here. *Id.* The 11th Court's determination contradicts this Court's holding in *Vick v. State*.

In *Vick*, this Court considered whether the separately described conduct listed in the subsections of Texas Penal Code §22.021 constituted separate statutory offenses and concluded that it did. *Vick v. State*, 991 S.W.2d 830, 833 (Tex. Crim. App. 1999). To reach that conclusion, the Court performed a statutory analysis and first discerned legislative intent, observing that § 22.021 outlines a conduct-oriented offense in which the legislature criminalized very specific conduct of several

different types in the individual subsections. *Id.* Additionally, the Court noted that the statute expressly separated subsections by "or," which indicated that any one of the proscribed conduct provisions constituted an offense. *Id.* The Court ultimately determined that the Legislature, in composing § 22.021, intended that each separately described conduct constituted a separate statutory offense.

The same analysis can be and should have been applied to the 11th Court's analysis of Texas Penal Code § 22.011 in the present case where the two offenses added to the indictment included:

> **COUNT TWO**: Appellant "intentionally and [sic] knowingly cause[d] the mouth of CNM, a child who was then and there younger than seventeen (17) years of age, to contact the male sexual organ of the said [Appellant]." TEX. PEN. CODE § 22.011 (a)(2)(E).
>
> **COUNT THREE**: Appellant "intentionally and [sic] knowingly cause[d] the female sexual organ of CNM, a child who was then and there younger than seventeen (17) years of age, to contact the mouth of [Appellant]." TEX. PEN. CODE § 22.011 (a)(2)(C).

Although the counts are presented in their corresponding judgments as violations of Tex. Pen. Code 22.011(a)(2), each act fell under separate subsections of the statute—(E) and (C). Applying the same statutory analysis here as in *Vick*, the same conclusion is reached—the subsections describe separate, distinct acts that are

separated by "or." The Legislature clearly intended for the separate acts to be separate offenses, capable of being charged in separate indictments and avoiding double jeopardy pitfalls. *See Vick* at 833. Therefore, the counts added to the indictment here were additional offenses, and the 11th Court erred when determining otherwise.

GROUND II: The 11th Court of Appeals erred where it applied an incomplete, and therefore wrong standard to dispose of Appellant's ineffective assistance of counsel claim.

ARGUMENT

When responding to Appellant's claim of ineffective assistance for failure to object, preserve error, or otherwise file a motion to quash the indictment, the 11th Court mentioned in its analysis a portion of the ineffective assistance standard as described in *Ex parte White*: "To show ineffective assistance of counsel for a failure to object, an appellant must show that the trial court would have committed error in overruling the objection." *See* Appx. A (Mem. Op. 9).; *see Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004).

Not only did the Court not address whether the trial court would have committed error in overruling the objection had it been made, but it failed to review the *Strickland* standard presented by Appellant and utilized by the trial court in its analysis. Instead, the 11th Court focused its analysis on whether Trial Counsel objected. *See* Appx. A (Mem. Op. 10). Notably, the ineffectiveness standard in *Ex*

parte White is only a portion of the necessary analysis. The whole analysis must include the *Strickland* prongs as well. In *Ex parte White*, once this Court decided the question of whether the trial court would have erred in overruling Trial Counsel's objection, it turned to the second prong's question of harm—even if only in the alternative context. *Ex parte White*, 160 S.W.3d at 53-54. The 11th Court did not do the same here. Even though Appellant presented the issue according to the *Strickland* prongs, the 11th Court did not analyze under *Strickland*. *See Strickland v. Washington*, 466 U.S. 668 (1984).

A. The 11th Court's conclusion failed to incorporate the ineffective standard it cited from *Ex parte White*, and it did not mention *Strickland*.

Because the amendment included additional offenses, as shown in Ground I above, Trial Counsel should have objected to it pursuant to Article 28.10(c). To that, the State, citing to *Stewart v. State*, asserted that Trial Counsel here "may have had a reason for not objecting, such as avoiding unnecessary delay, that was not articulated or elicited through direct or cross examination." *See* Appx. D (State's Br., 53); *see also Stewart v. State*, No. 05-95-01056-CR, 1997 Tex. App. LEXIS 2103 (Tex. App.—Dallas April 23, 1997, no pet.). The 11th Court acknowledged the State's assertion, and from that, determined that the trial court did not abuse its discretion in concluding that Trial Counsel was not ineffective. Mem. Op. 11. The 11th Court's conclusion failed to incorporate *Strickland* or the ineffective standard it cited from *Ex parte White*.

Instead, the Court, relying on the State's misguided argument, improperly attributed reasoning from *Stewart* to Trial Counsel here. In *Stewart*, the appellant appealed directly from his conviction, so the record was totally silent as to Trial Counsel's strategy or lack thereof. *See Stewart v. State* at *9.

Here, the record is not silent—Appellant's Motion for New Trial not only fails to support the reasoning found in *Stewart*, but wholly contradicts it. The State acknowledged as much, yet swiftly and inexplicably dismissed the contradiction.

The State acknowledged that Trial Counsel "testified that *he did object*." (emphasis added), *See* Appx. D (State's Br., 53). The State also admitted that the hypothetical reasons it presented as Trial Counsel's strategy were 'never articulated or elicited through direct or cross examination*;"* in other words, the trial strategy suggested by the State was not part of Trial Counsel's reasoning or testimony. *See* Appx. D (State's Br., 46).

Conversely, Appellant cited directly from the record to prove that Trial Counsel was ineffective:

> The State filed a motion to amend the indictment which changed Appellant's charged offenses from one count of sexual assault and one count of indecency with a child to three counts of sexual assault and one count of indecency. CR 42-49. The trial court granted the amendment the same date, within just minutes of the State's filing the motion. CR 49.
>
> Although the motion purports that trial counsel was served with a copy of the motion, such is likely impossible. The time between filing and the order alone is almost simultaneous. Additionally, trial counsel

> *stated* that in fact he did receive notice, he appeared at the hearing and he objected to the additions. He *testified* Appellant was present and that all of it was recorded in open court on the record, and should appear on the court's docket sheet as well. (emphasis added) RR Supp. 2:70-71.
>
> In fact, none of those things happened. There was no recorded hearing; there was no entry on the docket sheet; and there was no appearance by Appellant. . .The court reporter's records show no such hearing occurred. *See* RR Vol. 1. The trial court's docket sheet notes that on June 4, 2018, "granted motion to amend indictment." CR 145. No hearing is noted on the docket sheet.

See Appx. C (Appellant's Br., 20). Trial Counsel did not have a strategic reason for failing to object to the amended indictment. In fact, he stated on the record that he *did* object to the amendments, but no record of such an objection exists.

Despite the State's argument and this Court's reliance on it, the above demonstrates that Trial Counsel's failure to object to the amended indictment was not based on trial strategy—Trial Counsel knew, at least in hindsight, that an objection should have been made and attempted to retroactively insert one where none existed. The trial court allowed for it, and the 11th Court affirmed.

B. The 11th Court should have performed a complete *Strickland* analysis to conclude that Trial Counsel was ineffective.

In light of the conclusions established above—that the State's amendment added two new statutory offenses to the indictment and Trial Counsel failed to object to the amendment—the Court should have analyzed Appellant's question of ineffectiveness under *Strickland.* The first prong of *Strickland* was clearly satisfied—Trial Counsel's failure to object to the amendment fell below the

objective standard of reasonableness required of an attorney. Trial Counsel realized as much, which is why he testified that he objected when he did not.

The 11th Court, despite this Court's guidance in *Ex parte White*, never discussed the second prong of *Strickland*, but Appellant was clearly harmed here:

> Trial Counsel's unprofessional errors were detrimental to Appellant. If simply for the fact that Appellant received 10 years more on his sentences for the counts added by the amendment, 45 years on count 2 and 3 versus 35 and 25 years on counts 1 and 4. Had Trial Counsel acted professionally, the objections would have prevented the motion from being granted in accordance with Art. 28.10(c) because the amended indictment charged Appellant with two additional offenses of sexual assault not authorized by the grand jury.

See Appx. C (Appellant's Br., 21). Trial Counsel should have objected to the added counts, and the failure to do so fell below the standard of objective reasonableness required of an attorney which ultimately harmed Appellant. In short, Trial Counsel was ineffective, and the trial court abused its discretion where it held otherwise despite evidence and law to the contrary. The 11th Court erred where it affirmed the judgments of the trial court.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Petitioner prays this Court grant his petition; allow briefing on the merits; reverse the opinion and judgment of the 11th Court of Appeals; and remand to the trial court for a new trial.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that on October 18, 2021, a true and correct copy of the above and foregoing document was served on the Taylor County District Attorney's Office, by e-service.

/s/ Jacob Blizzard
Jacob Blizzard

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 2,236 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Jacob Blizzard
Jacob Blizzard

APPENDIX

A

Opinion filed June 17, 2021

In The

Eleventh Court of Appeals

No. 11-18-00184-CR

HAROLD GENE JEFFERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 104th District Court
Taylor County, Texas
Trial Court Cause No. 20708-B

M E M O R A N D U M O P I N I O N

The jury convicted Harold Gene Jefferson of three counts of sexual assault of a child and one count of indecency with a child. Appellant pleaded true to two prior felony convictions alleged for enhancement purposes. The jury assessed his punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for terms of thirty-five years, forty-five years, and forty-five years on the three convictions for sexual assault of a child, and for a term of twenty-five

years on the conviction for indecency with a child. The trial court ordered that all four sentences are to run concurrently.

Appellant challenges his convictions in two issues. In his first issue, Appellant contends that he received ineffective assistance of counsel at trial. In his second issue, Appellant asserts that his convictions on two counts of sexual assault of a child are void. We affirm.

Background Facts

The grand jury indicted Appellant in a two-count indictment. Count One alleged that Appellant committed sexual assault of a child by penetrating C.M.'s female sexual organ with Appellant's male sexual organ. *See* TEX. PENAL CODE ANN. § 22.011(a)(2)(A) (West Supp. 2020). Count Two alleged that Appellant committed indecency with a child by sexual contact by touching C.M.'s breast with his hand. *See id.* § 21.11(a)(1), (c) (West 2019). The State subsequently filed a motion to amend the indictment by adding two counts of sexual assault of a child and adding an additional manner or means for the previous allegation of indecency with a child. The additional counts of sexual assault of a child alleged that Appellant caused C.M.'s mouth to contact Appellant's male sexual organ and that Appellant caused C.M.'s female sexual organ to contact Appellant's mouth. *See id.* § 22.011(a)(2)(C), (E). The trial court granted the State's motion to amend the indictment, and the case proceeded to trial on the four counts alleged in the amended indictment.

The amended indictment alleged that all four counts occurred on or about February 6, 2014. Abilene Police Officer Brent Payne testified that he was flagged down by Wesley Mashburn in February 2014 on North Mockingbird. Mashburn told Officer Payne that his fifteen-year-old daughter, C.M., was a runaway and that he thought that she might be in a house across the street. Officer Payne knocked on the front door of the house to determine if C.M. was present. He testified that the

lady that answered the door, Sylvia Brown, told him that she did not believe that C.M. was in the house, but she permitted Officer Payne to look around. After locating C.M. asleep in a bedroom, Officer Payne returned her to Mashburn.

Mashburn believed that C.M. was under the influence of drugs. He took her to Serenity House for a drug test, and she tested positive for crack cocaine. Mashburn then took C.M. to Hendrick Medical Center for a sexual assault examination because C.M. made an outcry of sexual abuse.

Judy LaFrance, a sexual assault nurse examiner at Hendrick, examined C.M. on February 6, 2014. LaFrance testified that C.M. gave her the following history:

> My dad found me at Harold's house. He took me to Serenity House to get a drug screen and then brought me here for a rape kit because I had sex with a 60-year old man. . . . Harold bought a lot of crack and gives me some if I have sex with him. I've been at Harold's house for two days. We both smoked crack and had sex a lot of times. This drug dealer, Cam, came over. He's been trying to have sex with me for a couple of weeks. He gave me crack to have sex with him and we had sex once this morning.

LaFrance testified that C.M. told her that she had engaged in sexual intercourse with "Harold," that he had performed oral sex on her, and that he had made her perform oral sex on him. LaFrance also testified that C.M. was unkept, that her clothes were dirty, and that she was not wearing underwear. LaFrance observed a contusion and an abrasion in C.M.'s genital area, which LaFrance determined to be recent injuries. With respect to these injuries, LaFrance testified that C.M. told her, "I think he bit me."

LaFrance collected various swabs from C.M.'s body for DNA testing purposes. Brent Hester, a DNA analyst from the DPS crime laboratory in Lubbock, testified that Appellant could not be excluded as a contributor of DNA recovered from a swab taken from C.M.'s breast.

C.M. was nineteen at the time of trial in 2018. In February 2014, C.M. was living with Patricia Markham, a person that C.M. described as being "like a mother" to her. Abilene Police Detective Paul Martinez testified that Child Protective Services had placed C.M. with Markham. C.M. testified that Markham introduced her to crack cocaine and that C.M. was "hooked on it" "after that first hit."

C.M. testified that she and Markham had run out of money. They started staying with Craig Bell, who was Markham's drug dealer. C.M. testified that she met Appellant at Bell's house. Because of their financial situation, Markham began trying to get people to have sex with C.M. in exchange for drugs and money. C.M. and Markham left with Appellant to go to his house on Mockingbird for this purpose.

Although her memory was affected by her drug use, C.M. testified that she recalled having sex with Appellant a few times. She said that Appellant mostly wanted her to perform oral sex on him and that he frequently had trouble getting an erection. On the one or two times that he got an erection, Appellant would then have intercourse with C.M. C.M. also testified that Appellant performed oral sex on her and that he also touched her breasts.

C.M. testified that Appellant was in the room with her when Officer Payne found her at the house on Mockingbird. She further testified that her father was able to find her at the house because someone named "Ice Mike" told her father that she was there at the house.

Detective Martinez testified that C.M. picked Appellant out of a photo lineup. Detective Martinez interviewed Appellant in October 2016. Appellant denied knowing who C.M. or Markham were or anything about the house on Mockingbird. A recording of the interview was played at trial. Appellant stated in the interview that he cannot have sex and that he cannot get an erection. On cross-examination, Appellant's trial counsel confirmed with Detective Martinez that Appellant stated

during the interview that he was impotent. Appellant's trial counsel also cross-examined LaFrance about Appellant's impotency.

Analysis

In his second issue, Appellant contends that his convictions for Counts Two and Three are void because he was never indicted by a grand jury for these offenses. These two counts were for sexual assault of a child that were added by the amended indictment. The procedures for amending charging instruments are set out in Article 28.10. TEX. CODE CRIM. PROC. ANN. art. 28.10 (West 2006); *see State v. Murk*, 815 S.W.2d 556, 558 (Tex. Crim. App. 1991). An indictment that is improperly amended under Article 28.10 is not void but, rather, is only voidable, and a defendant waives any error to an amended indictment by failing to object to it at trial. *Trevino v. State*, 470 S.W.3d 660, 663 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (quoting *Woodard v. State*, 322 S.W.3d 648, 657 (Tex. Crim. App. 2010), for the proposition that "the 'right to a grand jury indictment under state law is a waivable right'").

Because the right to be indicted by a grand jury is a waivable right, convictions on counts added by an amended indictment are not void. *See Woodard*, 322 S.W.3d at 657; *Trevino*, 470 S.W.3d at 663. Accordingly, we overrule Appellant's second issue.

In his first issue, Appellant asserts that he received ineffective assistance of trial counsel. He contends that trial counsel was deficient because (1) he failed to research the law and the facts relating to Appellant's diagnosis of erectile dysfunction (ED); (2) he failed to adequately prepare and present Appellant's defense of ED; (3) he failed to secure an expert to testify about ED; and (4) he failed to object, preserve error, and otherwise contest the motion to amend the indictment.

To establish that trial counsel rendered ineffective assistance at trial, Appellant must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that the result would have

been different but for counsel's errors. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999) (citing *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and the defendant must overcome the presumption that the challenged action could be considered sound trial strategy. *Id.* at 689.

A claim of ineffective assistance of counsel "must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson*, 9 S.W.3d at 814 (quoting *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)). Direct appeal is usually an inadequate vehicle to raise such a claim because the record is generally undeveloped. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Direct appeal is especially inadequate when counsel's strategy does not appear in the record. *Id.* Trial counsel should ordinarily have an opportunity to explain his actions before an appellate court denounces counsel's actions as ineffective. *Id.* Without this opportunity, an appellate court should not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Id.* (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim App. 2001)).

Appellant filed a motion for new trial that contained the allegations upon which he bases his claims of ineffective assistance of counsel. The trial court conducted a hearing on the motion for new trial wherein the allegations were explored at length. Given that Appellant's claim of ineffective assistance of counsel was raised in a motion for new trial and evidence was heard on it at the hearing, we analyze the issue on appeal as a challenge to the trial court's denial of the motion for new trial, and we review it under an abuse of discretion standard. *Rodriguez v. State*, 553 S.W.3d 733, 748–49 (Tex. App.—Amarillo 2018, no pet.); *Shamim v. State*, 443

S.W.3d 316, 321 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (citing *Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004)). "[W]e reverse only if the trial court's decision to deny the motion for a new trial was arbitrary or unreasonable viewing the evidence in the light most favorable to the trial court's ruling." *Rodriguez*, 553 S.W.3d at 749 (citing *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012)).

We first direct our attention to the allegations concerning ED. Appellant called Dr. Imran Yazdani, his treating physician at the VA Clinic in Abilene, as a witness at the hearing on the motion for new trial. Dr. Yazdani practices internal medicine, and he treated Appellant for several years. Appellant offered over 1,100 pages of medical records from the VA through Dr. Yazdani.[1] Dr. Yazdani testified that Appellant had been treated for prostate cancer and that the treatment can cause ED. In that regard, Appellant had received external beam radiation in 2013 for prostate cancer.

Dr. Yazdani treated Appellant for ED in 2010 by prescribing medication to Appellant. In 2011, Dr. Yazdani changed the medicine that he prescribed for Appellant for ED and increased the dosage. On cross-examination, Dr. Yazdani testified that Appellant continued to receive ED medication through 2016 and that one could assume that it was working for Appellant if he continued to receive it. Dr. Yazdani further testified that Appellant's medical records indicated that Appellant had been diagnosed with antisocial personality disorder and that he had a hard time relating to people.

Appellant next called his trial counsel as a witness. Trial counsel testified that Appellant told him at the outset that he did not do the acts of which he had been

[1]The parties have not provided page cites to Appellant's voluminous medical records. For the most part, our references to the information contained in the medical records is derived from the matters addressed at the hearing on the motion for new trial.

accused. He further testified that Appellant told him that he had been treated for prostate cancer but that Appellant did not tell him that he had ED. Trial counsel testified that he did not pursue ED as a defense because Appellant did not tell him about it sooner and because it would only apply to one of the counts as a defense.

During the prosecutor's cross-examination, trial counsel testified that he believed that he provided Appellant with good and adequate representation. He further testified that he did not want to put Appellant's credibility at issue by addressing the ED issue at trial. Trial counsel further opined that the references in the medical records to Appellant's diagnosis of antisocial personality disorder would have been devastating.

Appellant testified that he told trial counsel during their first conference that he had ED and that he had no interest in sex. Appellant asserted that he quit trying to have sex in 2011 after having ED in 2010. Appellant's appellate counsel also testified at the hearing on the motion for new trial. He testified that there are objective tests that can be performed to determine if a male has ED and, thus, that an ED diagnosis is not entirely dependent on the male's subjective report of it.

The potential effect of additional evidence concerning Appellant's diagnosis is not easy to assess. We first note that evidence was presented at trial concerning Appellant's ED, including testimony from C.M. that Appellant had difficulty getting an erection. Appellant's trial counsel addressed Appellant's ED with Detective Martinez and LaFrance. Additionally, trial counsel testified that ED evidence would have only been relevant to one of the counts for which Appellant was tried.

Appellant asserts on appeal that trial counsel had nothing to lose by presenting medical evidence that Appellant suffered from ED and that trial counsel's decision not to present the evidence was not a strategic decision because trial counsel did not obtain a copy of Appellant's medical records. We disagree with Appellant's contention. As noted above, there is a factual dispute concerning if and when

Appellant told trial counsel that he had ED. The medical records indicate that Appellant received medicine to treat his ED and that he continued to receive the medication through 2016. Furthermore, Appellant's medical records indicated that he had been diagnosed with antisocial personality disorder. Trial counsel testified that this evidence would have been devastating at trial. We additionally note that Appellant's VA medical records indicated that he had been diagnosed and treated for cocaine dependency both before and after the events giving rise to Appellant's convictions.

In summary, the medical evidence pertaining to Appellant likely would have been a mixed bag. The evidence of ED would have only been relevant to one of the counts. Furthermore, there was negative evidence contained in Appellant's VA medical records. We conclude that the trial court did not abuse its discretion by overruling the motion for new trial on the allegations that trial counsel was ineffective for failing to present additional evidence pertaining to ED.

Appellant's remaining claim of ineffective assistance of counsel pertains to the State's motion to amend the indictment. He contends that trial counsel was ineffective by failing "to either object, preserve the error for review, or otherwise file a motion to quash the indictment." To show ineffective assistance of counsel for a failure to object, an appellant must show that the trial court would have committed error in overruling the objection. *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004).

Under Article 28.10(c), an indictment may not be amended over the defendant's objection as to form or substance if the amended indictment charges the defendant with an additional or different offense or prejudices his substantial rights. The State, through an amended indictment, charges a defendant with a different offense if the amendment changes the statutory offense. *Flowers v. State*, 815 S.W.2d 724, 728 (Tex. Crim. App. 1991) (per curiam). At least one court of appeals

has determined that an amended indictment does not allege an additional offense if it adds another count of the same charged offense. *See Duran v. State*, No. 07-07-0110-CR, 2008 WL 794869, at *3–4 (Tex. App.—Amarillo Mar. 26, 2008, pet. ref'd) (mem. op., not designated for publication). To determine whether a defendant's substantial rights are prejudiced by a proposed amendment to an indictment, we look to whether the amendment would impair the defendant's ability to prepare a defense. *Hillin v. State*, 808 S.W.2d 486, 488 (Tex. Crim. App. 1991).

The matter concerning trial counsel's actions in response to the State's motion to amend the indictment was discussed at the hearing on the motion for new trial. Trial counsel testified that he objected to the requested amendment at a hearing that Appellant attended. In this regard, Appellant asserted that the indictment was amended without his knowledge. There is no reporter's record from a hearing on the State's motion to amend the indictment. The State's motion to amend the indictment was filed on June 4, 2018. The docket sheet contains the following entry: "6-4-18 Granted motion to amend indictment." On June 7, 2018, Appellant's trial counsel filed a "Demand for Postponement," wherein he asserted that the trial setting of June 11, 2018, should be canceled in order that he would have at least ten days to respond to the amended indictment. *See* CRIM. PROC. art. 28.10(a). The trial court granted the request by resetting the trial date to June 25, 2018.

As noted previously, there is a factual dispute as to whether Appellant's trial counsel objected to the State's motion to amend the indictment. We must assume that the trial court resolved this conflict in support of its ruling that denied the motion for new trial. *See Rodriguez*, 553 S.W.3d at 749. Even if we assume that trial counsel did not oppose the amendment, the State cites *Stewart v. State*, No. 05-95-01056-CR, 1997 WL 196357, at *4 (Tex. App.—Dallas Apr. 23, 1997, no pet.) (not designated for publication), for the proposition that trial counsel might have a strategic reason for not opposing a requested amendment. In *Stewart*, the Dallas

Court of Appeals noted that trial counsel might not want to oppose a requested amendment in order to avoid unnecessary delay. *Id.* The State additionally notes that Appellant's defensive theory was the same for all offenses. *See Hillin*, 808 S.W.2d at 488 (defendant's substantial rights are not affected if his right to present a defense is not impaired). We conclude that the trial court did not abuse its discretion by denying Appellant's motion for new trial as it related to his claim of ineffective assistance of counsel with respect to the amended indictment. We overrule Appellant's first issue.

This Court's Ruling

We affirm the judgments of the trial court.

JOHN M. BAILEY
CHIEF JUSTICE

June 17, 2021

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Bailey, C.J.,
Trotter, J., and Williams, J.

IN THE COURT OF APPEALS
ELEVENTH DISTRICT OF TEXAS

HAROLD GENE JEFFERSON,	§	
	§	
Appellant	§	
	§	
vs	§	**11-18-00184-CR**
	§	
THE STATE OF TEXAS,	§	
	§	
Appellee	§	

MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

Comes now, HAROLD GENE JEFFERSON, Appellant in this cause, by and through his attorney of record, Jacob Blizzard, and pursuant to Rule 49 of the Texas Rules of Appellate Procedure, files this Motion for Rehearing, and would show this Court the following:

I. Points Relied Upon for Rehearing

A. The panel erred by concluding that Trial Counsel was not ineffective for failure to object, preserve error, and otherwise contest the State's motion to amend the indictment where such amendment added two additional offenses to Appellant's indictment according to the analysis and holding of *Vick v. State*, 991 S.W.2d 830 (Tex. Crim. App. 1999). Thus, the panel's analysis here runs contrary to *Vick*.

B. The panel erred where it ignored Appellant's argument concerning the void judgment exception and concluded that the judgments to counts 2 and 3 of Appellant's indictment were not void, but merely voidable. Such conclusion

runs contrary to the Court of Criminal Appeals' decisions in *Studer v. State*, 799 S.W.2d 263 (Tex. Crim. App. 1991), and *Woodard v. State*, 322 S.W.3d 648 (Tex. Crim. App. 2010).

C. The panel erred by concluding that Trial Counsel was not ineffective for failure to: (1) investigate the facts and law related to the case regarding Appellant's diagnosis of erectile dysfunction; (2) adequately prepare and present Appellant's defense of erectile dysfunction; and (3) secure an expert to testify to Appellant's benefit about erectile dysfunction. Such conclusion runs contrary to *Strickland v. Washington*, 466 U.S. 668 (1984) and *Ex parte Ybarra*, 629 S.W.2d 943, 946 (Tex. Crim. App. 1982).

Appellant seeks rehearing on a portion of his first issue alleging Trial Counsel's ineffectiveness for failure to object, preserve error, and otherwise contest the State's motion to amend the indictment, and the entirety of his second issue alleging that the convictions for counts 2 and 3 of Appellant's indictment were void because they were not charged by the grand jury, which stripped the trial court of its jurisdiction to hear them. Appellant also seeks rehearing on the remaining portion of his first issue alleging Trial Counsel's ineffectiveness for failure to (1) investigate; (2) adequately prepare for and present Appellant's defense; and (3) secure an expert to testify of Appellant's benefit.

II. Arguments in Support

1. **Issue I.4.**: The panel erred by concluding that Trial Counsel was not ineffective for failure to object, preserve error, and otherwise contest the State's motion to amend the indictment where such amendment added two additional offenses to Appellant's indictment according to the analysis and holding of *Vick v. State*, 991 S.W.2d 830 (Tex. Crim. App. 1999). Thus, the panel's analysis here runs contrary to *Vick*.
   a. Additional Offenses

As thoroughly outlined in Appellant's brief, the State's motion to amend the indictment added two offenses to Appellant's indictment where it included two additional counts of sexual assault to the existing one count of sexual assault and one count of indecency. Appellant's Br. 20. In its analysis of that issue, the panel first addressed whether Article 28.10(c) was violated to inform its analysis of whether Trial Counsel was ineffective for failing to object to the amendment. Mem. Op. 9-10. The panel quickly dispelled with that first part of the analysis, concluding that the additional counts to the indictment did not constitute additional or different offenses. Mem. Op. 10.

The panel relied on *Duran v. State*, an unpublished opinion out of the 7th Court of Appeals, to explain that an amended indictment does not allege an additional offense in contravention of Article 28.10(c) if it adds another count of the same charged offense. Mem. Op. 10. However, the 7th Court in *Duran* made its determination on an importantly distinctive set of facts. There, the question was whether two counts: (Count II): "penetration of A.H.'s sexual organ" and (Count III): "penetration of A.H.'s anus" charged separate or different offenses for 28.10(c) purposes. The 7th Court held they did not. However, both of those acts appear in the same subsection of the statute, §22.011(a)(2)(A): "causes the penetration of the anus or sexual organ of a child by any means."

Here, the additional counts hail from the same statute but from two distinct subsections of that statute: §22.011(a)(2)(C) and (a)(2)(E). Thus, the panel's reliance on *Duran* to determine whether the additional counts here amounted to separate and different offenses for 28.10(c) purposes is misplaced. Consequently, the panel's conclusion runs afoul of the Court of Criminal Appeals' analysis and holding in *Vick*.

In *Vick*, the Court of Criminal Appeals considered whether the separately described conduct listed in the subsections of Texas Penal Code §22.021 constituted separate statutory offenses and concluded that it did. 991 S.W.2d at 833. To reach that conclusion, the Court performed a statutory analysis and first discerned legislative intent, observing that § 22.021 outlines a conduct-oriented offense in which the legislature criminalized very specific conduct of several different types in the individual subsections. *Id.* Additionally, the Court noted that the statute expressly separated subsections by "or," which indicated that any one of the proscribed conduct provisions constituted an offense. *Id.* The Court ultimately determined that the Legislature, in composing § 22.021, intended that each separately described conduct constituted a separate statutory offense.

The same analysis can be and should be applied to the present case when analyzing Texas Penal Code § 22.011. The two offenses added to the indictment included the following two counts:

> **COUNT TWO**: Appellant "intentionally and [sic] knowingly cause[d] the mouth of CNM, a child who was then and there younger than

> seventeen (17) years of age, to contact the male sexual organ of the said [Appellant]." Tex. Pen. Code § 22.011 (a)(2)(E).
>
> **COUNT THREE**: Appellant "intentionally and [sic] knowingly cause[d] the female sexual organ of CNM, a child who was then and there younger than seventeen (17) years of age, to contact the mouth of [Appellant]." Tex. Pen. Code § 22.011 (a)(2)(C).

Although the counts are presented in their corresponding judgments as violations of Tex. Pen. Code 22.011(a)(2) only, it is clear that each act fell under separate subsections of the statute—(E) and (C). Applying the same statutory analysis here as in *Vick*, the same conclusion is reached—the subsections describe separate, distinct acts and are separated by "or." The Legislature clearly intended for the separate acts to be separate offenses, capable of being charged in separate indictments and avoiding double jeopardy pitfalls. *See Vick* at 833. Therefore, the counts added to the indictment here were additional offenses.

b. Ineffective Assistance

Because the amendment included additional offenses, Trial Counsel should have objected to it pursuant to Article 28.10(c) of the Texas Code of Criminal Procedure. To that, the State, citing to *Stewart v. State*, asserted that Trial Counsel here "may have had a reason for not objecting, such as avoiding unnecessary delay, that was not articulated or elicited through direct or cross examination." State's Br., 53. This Court acknowledged the State's assertion, and from that, determined that Trial Counsel was not ineffective. Mem. Op. 11. Both the State and the Court

improperly attributed reasoning from *Stewart* to Trial Counsel here. In *Stewart*, the appellant appealed directly from his conviction, so the record was totally silent as to Trial Counsel's strategy or lack thereof. No. 05-95-01056-CR, 1997 Tex. App. LEXIS 2103 at *9 (Tex. App.—Dallas Apr. 23, 1997, no pet.).

Here, the record is not silent—in fact, the record here, as developed in Appellant's Motion for New Trial not only fails to support the reasoning found in *Stewart*, but wholly contradicts it. The State acknowledged as much, yet swiftly and inexplicably dismissed the contradiction.

The State acknowledged that Trial Counsel "testified that *he did object*." (emphasis added), State's Br., 53. The State also admitted that the hypothetical reasons it presented as Trial Counsel's strategy were never "articulated or elicited through direct or cross examination;" in other words, the trial strategy suggested by the State was not part of the record.

Conversely, Appellant did cite to the record to support his assertion that Trial Counsel was ineffective:

> The State filed a motion to amend the indictment which changed Appellant's charged offenses from one count of sexual assault and one count of indecency with a child to three counts of sexual assault and one count of indecency. CR 42-49. The trial court granted the amendment the same date, within just minutes of the State's filing the motion. CR 49.
>
> Although the motion purports that trial counsel was served with a copy of the motion, such is likely impossible. The time between filing and the order alone is almost simultaneous. Additionally, trial counsel

> *stated* that in fact he did receive notice, he appeared at the hearing and he objected to the additions. He *testified* Appellant was present and that all of it was recorded in open court on the record, and should appear on the court's docket sheet as well. (emphasis added) RR Supp. 2:70-71.
>
> In fact, none of those things happened. There was no recorded hearing; there was no entry on the docket sheet; and there was no appearance by Appellant. . .The court reporter's records show no such hearing occurred. *See* RR Vol. 1. The trial court's docket sheet notes that on June 4, 2018, "granted motion to amend indictment." CR 145. No hearing is noted on the docket sheet.

Appellant's Br., 20. Trial Counsel did not have a strategic reason for failing to object to the amended indictment. In fact, he stated on the record that he *did* object to the amendments; yet, as Appellant noted above, no record of such an objection exists. That begs the question: why would Trial Counsel maintain, despite all evidence to the contrary, that he objected to the amended indictment? Appellant will not speak for Trial Counsel.

However, the State, relying on *Stewart*, an unpublished Dallas case, hypothesized a strategy for Trial Counsel, despite contrary evidence to it in the record. Then, this Court seized upon that unsupported hypothesis and determined Trial Counsel was not ineffective. Mem. Op. 11.

Despite the State's argument and this Court's decision to the contrary, the above demonstrates that Trial Counsel's failure to object to the amended indictment was not based on trial strategy. Further, Trial Counsel knew an objection should have been made.

Not only should an objection have been made, but Trial Counsel's failure to object resulted in Appellant's harm. As described in Appellant's brief:

> Trial Counsel's unprofessional errors were detrimental to Appellant. If simply for the fact that Appellant received 10 years more on his sentences for the counts added by the amendment, 45 years on count 2 and 3 versus 35 and 25 years on counts 1 and 4. Had Trial Counsel acted professionally, the objections would have prevented the motion from being granted in accordance with Art. 28.10(c) because the amended indictment charged Appellant with two additional offenses of sexual assault not authorized by the grand jury. Appellant's Br., 21.

Trial Counsel should have objected to the added counts, and the failure to do so amounted to ineffectiveness. The trial court abused its discretion where it held that trial counsel was effective despite so much evidence to the contrary. Because this court then affirmed the trial court's decision, it also decided Appellant's case contrary to established law, specifically as found in *Vick*. As such, it must withdraw its previous opinion and grant Appellant's present motion in order to reexamine its treatment of the fourth sub-point of Appellant's first issue.

2. **Issue II.**: The panel erred where it ignored Appellant's argument concerning the void judgment exception and concluded that the judgments to counts 2 and 3 of Appellant's indictment were not void, but merely voidable. Such conclusion runs contrary to the Court of Criminal Appeals' precedent, including its decisions in *Studer v. State*, 799 S.W.2d 263 (Tex. Crim. App. 1991), and *Woodard v. State*, 322 S.W.3d 648 (Tex. Crim. App. 2010).

Even if this Court determines that the amended indictment included additional offenses not presented to the grand jury and further determined that Trial Counsel

had a "strategic reason" for not opposing the amendment, it cannot then escape Appellant's void judgment assertion in his second issue.

In its analysis of Appellant's second issue, the panel conflated two waiver issues and ultimately reached an erroneous conclusion. First, relying on *Trevino v. State*, the panel noted that an improperly amended indictment is not void, but voidable, and a defendant waives any error to an amended indictment by failing to object to it at trial. Mem. Op. 5; 470 S.W.3d 660, 662 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.). While that is true for some amended indictments, it is not true for all. An initial analysis must be performed on the indictment to determine whether it is voidable or void, and thus, whether it can be waived or not, respectively. *See Ex parte Patterson*, 969 S.W.2d 16, 19-20 (Tex. Crim. App. 1998).

In *Ex parte Patterson*, the Court of Criminal Appeals recognized the 1991 *Studer* decision, which changed the effect of a defect of substance in an indictment. 969 S.W.2d at 19. Since 1991, a defect of substance in a charging instrument does not automatically render a judgment void. *Id.* It follows that an indictment flawed by a defect of substance *but which purports to charge an offense* is not fundamentally defective and, in the absence of a pretrial objection, will support a conviction. *Id.* (citing *Studer v. State*, 799 S.W.2d 263 (Tex. Crim. App. 1991) (*Ex parte Gibson*, 800 S.W.2d 548, 551 (Tex. Crim. App. 1990)). However, where an indictment fails to charge a person with the commission of an offense pursuant to

Article V, §12(b) of the Texas Constitution, it is void and incapable of invoking the court's jurisdiction. The absence of jurisdiction renders the judgment a complete nullity and exempts the defendant from the rules of procedural default, meaning, even if a defendant does not object, he does not waive the defect because a judgment's voidness is cognizable at any time. *Ex parte Patterson* at 19.

That is precisely what Appellant argued here. Appellant's Br., 22. The amendment that added two counts to Appellant's indictment constituted new offenses that were not presented to the grand jury. The panel, in its analysis of Appellant's first issue, found that counts 2 and 3 were not new or different offenses for 28.10(c) purposes, which lead to an erroneous conclusion following its analysis of Appellant's second issue.

Second, the panel erroneously extended the waive-if-not-objected-to-at-pre-trial requirement of Article 1.14(b) to a defendant's right to be indicted by a grand jury. A defendant's right to be indicted by a grand jury is waivable; that is true. But, according to *Woodard v. State*, a case relied on by the panel, such a waiver requires an express waiver by the defendant, not a forfeiture by inaction. 322 S.W.3d 648, 657 (Tex. Crim. App. 2010). Prior to *Woodard*, in *Marin v. State*, the Court of Criminal Appeals recognized that the most fundamental rights can be forfeited if not insisted upon by the party to whom they belong; however, some rights must be protected by the system's impartial representatives unless expressly waived by the

party to whom they belong. 851 S.W.2d 275, 279 (Tex. Crim. App. 1993), overruled on other grounds by *Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997). Again, as described in *Woodard*, forfeiting one's right to a grand jury indictment must be done so expressly.

Here, Appellant did not expressly waive his right to be indicted by a grand jury; thus, the addition of new offenses to the indictment that were not presented to the grand jury failed to vest the trial court with jurisdiction in the present case, and the judgments that resulted from them are void. *See Trejo v. State*, 280 S.W.3d 258, 261 (Tex. Crim. App. 2009); *see Nix v. State*, 65 S.W.3d 664, 667-68 (Tex. Crim. App. 2001).

Because this court determined the convictions and judgments resulting from the additional offenses presented as Counts 2 and 3 in Appellant's amended indictment were not void, it must withdraw its previous opinion and grant Appellant's present motion in order to reexamine its treatment of the Appellant's second issue.

3. **Issue I.1; I.2; and I.3**: The panel erred by concluding that Trial Counsel was not ineffective for failure to: (1) investigate the facts and law related to the case regarding Appellant's diagnosis of erectile dysfunction; (2) adequately prepare and present Appellant's defense of erectile dysfunction; and (3) secure an expert to testify to Appellant's benefit about erectile dysfunction. Such conclusion runs contrary to *Strickland v. Washington*, 466 U.S. 668 (1984) and *Ex parte Ybarra*, 629 S.W.2d 943, 946 (Tex. Crim. App. 1982).

When analyzing whether Trial Counsel was ineffective for failure to investigate, prepare or secure expert testimony, as asserted by Appellant, this Court relied on Trial Counsel's testimony at the motion for new trial hearing to determine Trial Counsel was not ineffective. Such reliance was error to the extent that Trial Counsel's testimony was given with the benefit of hindsight; he did not speak to the decisions he made at the time of trial. *See Aldrich v. State*, 296 S.W.3d 225, 244 (Tex. App.—Fort Worth 2009, pet. ref'd.).

a. Failure to Investigate and Prepare a Defense

Strickland and its progeny clearly state that a court deciding an ineffectiveness claim must judge the reasonableness of counsel's challenged conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). As a result, the benefit of hindsight should not benefit the defendant in his ineffectiveness claim, nor Trial Counsel in his ineffectiveness defense. In other words, "hindsight is discounted by pegging adequacy to 'counsel's perspective at the time 'investigative decisions are made.'" *Rompilla v. Beard*, 545 U.S. 374, 381 (2005).

Despite Supreme Court precedent, the panel here allowed Trial Counsel to benefit from hindsight where it described the medical evidence as "a mixed bag." Mem. Op. 9. The panel considered that "the evidence of erectile dysfunction would have only been relevant to one of the counts and there was negative evidence

contained in Appellant's VA medical records," including that Appellant had been diagnosed with antisocial personality disorder and was at one time diagnosed and treated for cocaine dependency. *Id.*

The panel accorded much weight to that negative evidence; yet, Trial Counsel did not know about it before attending the motion for new trial hearing because he did not request Appellant's medical records prior to trial. As Appellant pointed out in his brief, "[Trial Counsel] only learned of these anti-social personality traits because Appellate Counsel produced the records at the motion hearing." Appellant's Br., 18. And only then, when the State asked Trial Counsel about the diagnosis at the new trial hearing did Trial Counsel provide the hindsight reasoning for not seeking the medical records—to use them would have been "devastating" to Appellant's case. State's Br., 36. It is arguable whether such findings would have been devastating, but what is impervious to argument is that Trial Counsel did not know that the diagnoses existed at the time he was making investigative decisions for trial. He did not consider whether the records would devastate or bolster Appellant's defense; he did not consider the records at all.

Trial Counsel did have personal knowledge of Appellant's impotence as Appellant testified he told him about it, and more importantly, Trial Counsel admitted he had seen on the videoed statement to the police that Appellant had claimed to have erectile dysfunction. RR Supp. 2:59. Yet, Counsel's claimed

ignorance is relied upon by the State and accepted by this Court in its holding. Mem. Op., 8.

Notwithstanding, the panel disregarded *Strickland's* requirement that a court look to a counsel's conduct at the time investigative decisions were made to determine whether counsel was ineffective. Without contravening the reasoning and holding of *Strickland* and its extensive federal and state progeny, the panel could not have reached the same conclusion.

b. Failure to secure expert testimony

Trial Counsel testified that he viewed Appellant's discovery, that he even reviewed the discovery with Appellant. Appellant's Br., 11. However, at the motion for new trial hearing, Trial Counsel testified that although he viewed Appellant's interview with the detective where Appellant clearly told the detective that he could not have sex because he was impotent, Trial Counsel maintained that he did not know Appellant was impotent until the day of trial. *Id*.

It is not merely the governing law that a defense attorney must grasp before rendering effective assistance; he must have a firm command of the facts as well. *Sykes v. State*, 586 S.W.3d 522, 533 (Tex. App.—Houston [14th Dist.] 2019, no pet. h.) (citing *Ex parte Ybarra*, 629 S.W.2d 943, 946 (Tex. Crim. App. 1982). When a reviewing court assesses the reasonableness of an attorney's investigation, it considers the quantum of evidence known by the attorney to determine whether that

evidence would have lead a reasonable attorney to investigate further. *Sykes*, 586 S.W.3d at 533.

Assuming that Trial Counsel's testimony was true, it merely enforces Appellant's assertion that Trial Counsel failed to investigate the case. Had Trial Counsel sought and reviewed Appellant's medical records, not only would he have discovered Appellant was impotent, but he would have discovered that the impotence stemmed from the medication Appellant had to take after being diagnosed with prostate cancer. Once Trial Counsel discovered Appellant's medical condition, he should then have investigated further and sought expert testimony to explain Appellant's conditions to the jury. Hearing Appellant was impotent through Appellant's own testimony is one thing; hearing a doctor's explanation of his diagnosis, treatment, and physical ramifications from said treatment is quite another. Appellant's jury should have heard from Appellant's doctor.

This Court's attribution of negative information is not dispositive of this issue here. A competent trial attorney would present expert testimony on the relevant testimony regarding Appellant's impotence, as supported by the medical records or Appellant's treating physician. Just because that relevant evidence was admitted, does not mean that irrelevant prejudicial information from the medical records would be admitted before the jury. A skilled and competent attorney would seek to

restrict from admission prior cocaine use and anti-social personality traits as irrelevant and overly prejudicial to Appellant.

The State and this Court takes the position that the records are a "mixed bag" because while useful to the defense, they would also be negative. This analysis fails to contemplate the skills of a competent trial attorney and the rules of evidence's impact on the negative information. Certainly, Trial Counsel could have offered only those records or testimony which was relevant and useful to defense, and hold back or contest offering any other records or testimony that was negative. However, this Court assumes that the records must be accepted as a whole or disregarded completely. The "mixed bag" was unknown to Trial Counsel, and while evidence of anti-social personality traits and prior cocaine use are certainly not desirable defensive evidence, the position that Trial Counsel would not have used them at all because of their negative implications is just not how competent trial counsel use and evaluate evidence. What is telling here is that Trial Counsel was never able to make any decisions regarding the evidence because he failed to conduct a competent investigation on Appellant's behalf.

Trial Counsel's failure to investigate Appellant's case hindered his defense and amounted to ineffectiveness. *See Ex parte Ybarra* at 946.

III. Prayer for Relief

Appellant respectfully prays this Court grant his Motion for Rehearing, withdraw its previous opinion, and reexamine its treatment of Appellant's first and second issues as outlined above, then reverse the judgment and remand the case to the trial court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on August 2, 2021, a true and correct copy of the above and foregoing document was served on the District Attorney's Office, Taylor County by electronic service.

/s/ Jacob Blizzard
Jacob Blizzard

Automated Certificate of eService

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IN THE COURT OF APPEALS
ELEVENTH DISTRICT OF TEXAS

HAROLD GENE	§	
JEFFERSON	§	
Appellant	§	
	§	**11-18-00184-CR**
	§	
VS.	§	
	§	
THE STATE OF TEXAS	§	
	§	
Appellee	§	

APPELLANT'S BRIEF

ON APPEAL FROM CAUSE NO. 20708-B IN THE 104TH JUDICIAL DISTRICT COURT OF TAYLOR COUNTY, TEXAS

ORAL ARGUMENT REQUESTED

Submitted by:
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RECORD REFERENCES

The Clerk's Record contains all of the pleadings, orders, and correspondence filed with (or sent to) the trial court and clerk that are pertinent to this appeal. References in this brief to the Clerk's Record are by page number, indicated as "CR __." The Reporter's Record includes seven original volumes. References to the Original Reporter's Record are by volume, page number, and line number (where applicable), indicated as "RR ___:___:___." There are four supplemental volumes. References to Supplemental Reporter's Record are by page number, and line number (where applicable), indicated as "RR Supp. ___:___ ."

PARTY REFERENCES

Harold Gene Jefferson will be referred to as "Appellant." The State of Texas will be referred to as the "State." Lynn Ingalsbe, trial counsel for Appellant, will be referred to as "Trial Counsel." Jacob Blizzard, appellate counsel for Appellant, will be referred to as "Appellate Counsel."

TO THE HONORABLE COURT OF APPEALS:

APPEAL POINTS PRESENTED

I. Whether Appellant was denied effective assistance of counsel where trial counsel:

- **a. Failed to investigate the facts and law related to the case regarding Appellant's diagnosis of erectile dysfunction;**
- **b. Failed to adequately prepare and present Appellant's defense of erectile dysfunction;**
- **c. Failed to secure an expert to testify to Appellant's benefit about erectile dysfunction;**
- **d. Failed to object, preserve error, or otherwise contest the motion to amend the indictment; and**
- **e. But for Trial Counsel's unprofessional errors, the result of Appellant's trial would have been different.**

II. Whether Appellant's convictions for counts 2 and 3 were void because they were not charged against Appellant by the grand jury.

STATEMENT OF THE CASE

Appellant was indicted in this case for the offenses Sexual Assault and Indecency with a Child by Contact, both second degree felonies. CR 11-12. The State filed a motion to amend the indictment on June 4, 2018 at 8:05 a.m. CR 42-49. The motion was granted at 8:07 a.m. the same date. No hearing was held on the motion, and the motion was granted without objection. CR 145 & 50. The amendment to the indictment charged two additional counts. The indictment moved the original second count to become count 4, while the indictment alleged two new charges of sexual assault of a child, by contact between mouth of victim

with Appellant's sexual organ (count 2) and by contact between mouth of Appellant and sexual organ of victim (count 3). CR 42-49.

Appellant stood trial before a jury from June 25, 2018 to June 29, 2018. RR 1. The jury found Appellant guilty. Appellant did not testify in guilt/innocence, but did testify in the punishment phase of the trial. The jury assessed Appellant's punishment at 35 years on Count 1, 45 years on Count 2, 45 years on Count 3, and 25 years on Count 4.[1] CR 82-84. The trial court found Appellant guilty and assessed Appellant's punishment as was found by the jury on June 29, 2018. RR 6:79-80. On July 24, 2018, Appellant filed a motion for new trial, alleging ineffective assistance of his trial counsel. CR 110. The court held a hearing on Appellant's motion on August 17, 2018 and August 30, 2018. RR Supp. 1-4. The court then denied Appellant's motion for new trial by written order on September 10, 2018. CR 142. Appellant filed his notice of appeal on July 16, 2019. CR 102. Appellant requested findings of fact and conclusions of law. CR 143. None were entered. This appeal follows.

STATEMENT OF FACTS

Appellant does not challenge the sufficiency of the evidence in this case, therefore the recitation of the facts is limited to the those pertinent to Appellant's two asserted issues.

[1] Although no election appears in the file, apparently Appellant elected the jury to assess punishment. RR 2:4.

Dr. Yazdani, Appellant's treating physician at the Veteran's Administration, testified that Appellant had long suffered from prostate cancer, erectile disfunction which had not been treated successfully. RR Supp. 2:11-13. In 2013, Appellant was treated by beam radiation for prostate cancer. RR Supp. 2:12 & 2:15-16. Dr. Yazdani testified that the radiation treatments can cause erectile disfunction in approximately 35-40 percent of patients. RR Supp. 2:15-16. Dr. Yazdani testified that Appellant suffered from erectile dysfunction on June 30, 2010 when Dr. Yazdani conducted an evaluation of him. RR Supp. 2:16. Dr. Yazdani testified that medication does not always fix erectile dysfunction. RR Supp. 2:18. Dr. Yazdani noted that Appellant's erectile dysfunction was of an organic origin, stemming from Appellant's high blood pressure, high cholesterol, mental health, mental health medications, the fact that Appellant was a smoker and had been treated for prostate cancer. RR Supp. 2:19-20. In 2011, records reflected that medication did not resolve Appellant's erectile dysfunction. RR Supp. 2:22. In February 2012, Appellant reported no libido and erectile dysfunction. RR Supp. 2:23-24. Dr. Yazdani confirmed that Appellant still suffered from erectile dysfunction May 4, 2015. RR Supp. 2:29-32.

Appellant's trial counsel was contacted by Appellant to represent him. After meeting with Appellant, trial counsel agreed to the representation and entered a motion to substitute counsel over Appellant's former appointed counsel. CR 21-22.

Once retained, trial counsel obtained discovery from the district attorney's office, "early on in the case." RR Supp. 2:58-59. This included various reports and an interview with Appellant where Appellant is heard telling the detective that he could not have sex with the alleged victim because he was diagnosed as impotent. RR 7:SX64 (approx. 14 min. mark). Trial counsel maintains that he reviewed this video early on in the case. RR Supp. 2:59. Trial counsel maintained that he reviewed the discovery with Appellant at the jail, but only by reading the pertinent portions of the discovery to Appellant, because he did not redact the discovery as required under Art. 39.14. RR Supp. 2:60. Trial counsel maintained that he did not hear that Appellant was impotent until the day of trial. RR Supp. 2:62.

Trial counsel maintained that "if he had told me early on and that had been a medical diagnosis from a medical provider of erectile dysfunction, yes, I would have pursued that." RR Supp. 2:63. Trial counsel then maintains that he did not believe it to be a good defense because it only was a defense to one of the counts of the indictment (penetration of the sexual organ). RR Supp. 2:62.

Trial counsel in cross examination of Det. Martinez points out that Appellant had told Martinez he was impotent had been diagnosed as impotent, could not achieve an erection, and could not have sexual intercourse because he could not achieve an erection. RR 5:22. Yet, trial counsel could not recall that such statements were contained in the video, even though he personally questioned Det.

Martinez on the matter. RR Supp. 2:63-64. Trial counsel could not remember that he had crossed Det. Martinez on the erectile dysfunction. RR Supp. 2:64.

Appellant's sister, Frankie Ware testified that trial counsel discussed prostate cancer, erectile dysfunction, and medical records on the day of trial. RR Supp. 2:47. Then the next day following jury selection, trial counsel asked Ms. Ware if she had retrieved the records from Hendrick Medical Center. RR Supp. 2:47. Ms. Ware was shocked and thought that he would have retrieved the records and that she had no method of obtaining the records. RR Supp. 2:47-48.

Other than trial counsel's brief cross regarding to impotence to Det. Martinez, trial counsel failed to investigate, prepare, or present any evidence of erectile dysfunction to the jury. The jury wanted to listen to the video, by its note to Judge Hamilton requesting to hear the evidence related to Appellant's impotence in the interrogation. CR 97; RR 5:211. The video was played for the jury again.

Trial counsel represented that he assumed that there could be experts who could give opinions on whether Appellant could achieve a sufficient erection for penetration, but further stated that he did not look into such experts. RR Supp. 2:91-92. Additionally, Appellant's appeal counsel testified that experts are available in the field of Urology to give opinions on such issues, conduct tests on Appellant, and assist in the defense for trial. RR 3:69-71.

APPELLANT'S FIRST ISSUE

I. Whether Appellant was denied effective assistance of counsel where trial counsel:

- **a. Failed to investigate the facts and law related to the case regarding Appellant's diagnosis of erectile dysfunction;**
- **b. Failed to adequately prepare and present Appellant's defense of erectile dysfunction;**
- **c. Failed to secure an expert to testify to Appellant's benefit about erectile dysfunction;**
- **d. Failed to object, preserve error, or otherwise contest the motion to amend the indictment; and**
- **e. But for Trial Counsel's unprofessional errors, the result of Appellant's trial would have been different.**

1. Preservation of error

Effective assistance of counsel is a guaranteed right of the United States Constitution under the Sixth Amendment and Article I, § 9 of the Texas Constitution. For claims of ineffective assistance of counsel based on action/inaction by the attorney, the defendant is not required to present his complaint to the trial court before presenting it on appeal. Ineffective assistance of counsel claims can be raised for the first time on appeal.

2. Standard of review

To prevail on an ineffective assistance of counsel claim under *Strickland v. Washington*, the applicant must show that (1) counsel's performance was deficient by falling below an objective standard of reasonableness and (2) there is a probability, sufficient to undermine the confidence in the outcome, that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. *Strickland v. Washington,* 466 U.S. 668 (1984). The applicant must prove both of these prongs by a preponderance of the evidence. *Tong v. State,* 25 S.W.3d 707, 712 (Tex. Crim. App. 2000).

To determine whether counsel has provided effective assistance, courts must consider the totality of the representation and the particular circumstances of each case. While Texas has been hesitant to "designate any error as *per se* ineffective assistance of counsel as a matter of law," it is possible that a single egregious error of omission or commission by appellant's counsel constitutes ineffective assistance. *Jackson v. State,* 766 S.W.2d 504, 508 (Tex. Crim. App. 1985) (failure of trial counsel to advise appellant that judge should assess punishment amounted to ineffective assistance of counsel) (modified on other grounds on remand from U.S. Supreme Court, *Jackson,* 766 S.W.2d 518 (Tex. Crim. App. 1988)); *see also Ex parte Felton,* 815 S.W.2d 733, 735 (Tex. Crim. App. 1991, en banc) (failure to challenge a void prior conviction used to enhance punishment rendered counsel ineffective). This position finds support in opinions of the United States Supreme Court, which has also held that a single egregious error can sufficiently demonstrate ineffective assistance of counsel. *Murray v. Carrier,* 477 U.S. 478 (1986); *United States v. Cronic,* 466 U.S. 648 (1984); *see Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Where counsel's deficient conduct is sufficient to undermine confidence in the outcome of the proceeding, "reasonable

probability" that the result would have been different exists. *Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014).

Appellant's trial counsel committed numerous errors throughout his representation of Appellant, such that Appellant did not receive competent counsel guaranteed under the U.S. Constitution and Texas Constitution. Such representation fell below an objective standard of reasonableness and bears a sufficient probability to undermine the confidence in the outcome of the trial so that the results of the trial would have been different had defense counsel not committed such unprofessional errors. Appellant was deprived of his right to a fair trial due to the ineffective assistance of Appellant's trial counsel. These issues are discussed in depth below.

3. Failure to present defensive medical records and medical testimony is ineffective assistance of counsel

Failure to present medical testimony to explain critical facts of the case is ineffective assistance of counsel. *See Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014). In *Ex parte Overton*, the Court of Criminal Appeals found trial counsel ineffective for failure to present evidence on the issue of sodium intoxication in the death of a child. The testimony was critical to the defense showing that the accused had not caused the death of the child. The Court found that had such testimony been offered the proceedings likely would have been

different, even though the State had presented an expert with contrary findings.

Likewise, in *Ex parte Briggs*, 187 S.W.3d 458, 467 (Tex. Crim. App. 2005), the court stated that failure to investigate or present medical evidence is ineffective assistance of counsel. The court held that such an attorney has several viable options to present a medical defense in an effective manner, if funding is an issue:

> 1. Subpoena all of the doctors who had treated Daniel during the two months of his life to testify at trial. Introduce the medical records through the treating doctors and elicit their expert opinions;
> 2. If counsel was convinced that applicant could not pay for experts to assist him in preparation for trial or to provide expert testimony, withdraw from the case, explaining to the court that applicant was now indigent, prove that indigency (as was done in the writ proceeding), and request appointment of new counsel;
> 3. Remain as counsel with the payment of a reduced fee, but request investigatory and expert witness fees from the trial court for a now-indigent client pursuant to *Ake v. Oklahoma.*

Ex parte Briggs, 187 S.W.3d 458, 468 (Tex. Crim. App. 2005) (footnotes omitted). Here, whether finances were an issue or not, Counsel could have presented at least what was presented at the motion for new trial hearing: the testimony of his treating physician Dr. Yazdani, the medical records documenting a long history of prostate cancer, prostate cancer treatment, risk factors indicating a higher likelihood of erectile dysfunction, and consistent failed treatment for erectile dysfunction both before and after the dates of the alleged offense.

Failure to present the evidence of erectile dysfunction was not a reasonable

trial strategy. There was no objective basis not to present the evidence. There was nothing to lose by presenting the evidence. Trial counsel did pursue the trial strategy, but did so insufficiently. The evidence would have gone to negate Appellant's ability or desire in sexual activity. Trial counsel crossed Det. Martinez as follows:

> Q. During the interview, did Harold tell you that he was impotent?
> A. He brought it up, yes.
> Q. That he has been diagnosed with impotency?
> A. He said he could not ejaculate, yes.
> Q. Did he tell you that he couldn't even achieve an erection?
> A. I don't remember if he said that specifically, but that was the impression that I heard. That's what I remember or that's how I took it.
> Q. Didn't he tell you and you understand him to be saying that he could not have sexual intercourse because he could not achieve an erection?
> A. That's what he said.

RR 5:22. Could it have been a reasonable trial strategy to only cross examine a witness with a defendant's self-serving remarks stating that he could not get an erection, but fail entirely to present the available proof showing that Appellant had a long standing diagnosis of erectile dysfunction consistent with Appellant's other medical problems? The answer is no. A professional advocate for a client in this position should have at a minimum presented the medical records and the testimony of Dr. Yazdani. This testimony would likely have a large impact on the jury as the jury took serious consideration of the issue of erectile dysfunction. During deliberations, the jury requested to watch the video of the

interrogation to hear again about Appellant's statements concerning erectile dysfunction. Given the jury's consideration of such an issue, the failure to present supportive evidence of Appellant's erectile dysfunction was devastating to Appellant's case.

Not using the evidence out of reasonable trial strategy would require that there was some disadvantage to putting forward the evidence. In the motion for new trial hearing, Trial Counsel through the State's cross examination pointed out that the medical records would have shown that Appellant had anti-social personality traits. RR Supp. 2:94. This is not something that Trial Counsel knew prior to the motion for new trial. He only learned of these anti-social personality traits because Appellate Counsel produced the records at the motion hearing.

Trial counsel never sought the records out, never talked to Dr. Yazdani, nor did he investigate the facts underlying Appellant's erectile dysfunction, which he knew about early on in the case from the interrogation video. Therefore, such a determination was not made strategically by trial counsel. Although Appellant testified that he told trial counsel early on about his erectile dysfunction, trial counsel denied this fact. RR Supp. 2:16. Trial counsel admits Appellant told him of his prostate cancer, and he admits that he watched the interrogation video where Appellant tells Det. Martinez about the erectile dysfunction. However, even if true

that this posed some disadvantage to Appellant, the advantage of presenting evidence of Appellant's erectile dysfunction far outweigh such a disadvantage. The State and Trial Counsel's theory of non-use was in fact not reasonable trial strategy, as they maintained that the records could not be relied upon because Appellant self-reported erectile dysfunction. However, as Appellate Counsel testified, experts are available to further support the medical records. Had such an expert been retained to perform tests on Appellant, this expert could have testified to the veracity of the medical records. Even without the expert, the records show a long-standing diagnosis tied to known causes of erectile dysfunction long before Appellant had any motive to create a story about erectile dysfunction.

Trial Counsel's failure to present evidence of Appellant's erectile dysfunction through medical records and his treating physician's testimony was ineffective assistance of counsel.

4. Trial counsel was ineffective for failing to preserve error or object to the indictment amendment adding two additional counts of sexual assault

Art. 28.10 states in relevant part:

> An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced.

Tex. Crim. Proc. Code Ann. § 28.10 (West). The State filed a motion to amend the indictment which changed Appellant's charged offenses from one count of sexual assault and one count of indecency with a child to three counts of sexual assault and one count of indecency. CR 42-49. The trial court granted the amendment the same date, within just minutes of the State filing of the motion. CR 49.

Although the motion purports that trial counsel was served with a copy of the motion, such is likely impossible. The time between filing and the order alone is almost simultaneous. Additionally, trial counsel stated that in fact he did receive notice, he appeared at the hearing and he objected to the additions. He testified Appellant was present and that all of it was recorded in open court on the record, and should appear on the court's docket sheet as well. RR Supp. 2:70-71.

In fact, none of those things happened. There was no recorded hearing, there was no entry on the docket sheet, and there was no appearance by Appellant. The State did not attempt to refute in its closing argument that there was no such hearing. The court reporter's records show no such hearing occurred. See RR Vol. 1. The trial court's docket sheet notes that on June 4, 2018 "granted motion to amend indictment." CR 145. No hearing is noted on the docket sheet. Even if a hearing existed as trial counsel claims, trial counsel failed to preserve an objection to the amendment by requiring the hearing to be recorded or objecting in writing to

the lack of a court reporter. Trial counsel's failure to either object, preserve the error for review, or otherwise file a motion to quash the indictment (if no notice was provided) constituted ineffective assistance of counsel.

These unprofessional errors were detrimental to Appellant. If simply for the fact that Appellant received 10 years more on his sentences for the counts added by the amendment, 45 years on count 2 and 3 versus 35 and 25 years on counts 1 and 4. Had trial counsel acted professionally, the objections would have prevented the motion from being granted in accordance with Art. 28.10 because the indictment amendment charged Appellant with two additional offenses of sexual assault not authorized by the grand jury. Therefore, this Court should reverse Appellant's convictions and remand the case for a new trial on the merits.

APPELLANT'S SECOND ISSUE

I. Whether Appellant's convictions for counts 2 and 3 were void because they were not charged against Appellant by the grand jury

1. Standard of review and preservation of error

The void judgment exception recognizes that there are some rare situations in which a trial court's judgment is accorded no respect due to a complete lack of power to render the judgment in question. *Nix v. State*, 65 S.W.3d 664, 667-68 (Tex. Crim. App. 2001). A void judgment is a "nullity" and can be attacked at any time. *Id.* Therefore, Appellant may present the issue for the first time on appeal.

2. Appellant's judgments as to counts 2 and 3 are void

Bailey v. State, No. 10-12-00050-CR, 2013 WL 3770947, at *2 (Tex. App. July 18, 2013) sets out the ways in which a judgment is void:

> A judgment of conviction for a crime is void only when: (1) the document purporting to be a charging instrument does not satisfy the constitutional requisites of a charging instrument, and thus, the trial court has no jurisdiction over the defendant; (2) the trial court lacks subject-matter jurisdiction over the offense charged; (3) the record reflects that there is no evidence to support the conviction; or (4) an indigent defendant is required to face criminal trial proceedings without appointed counsel when the right to counsel has not been waived.

(internal citations omitted). The Texas Constitution requires that, unless waived by the defendant, the State must obtain a grand jury indictment in a felony case. *Rivers v. State*, No. 05-16-00847-CR, 2017 WL 1536513, at *6 (Tex. App. Apr. 27, 2017) (citing *Teal v. State*, 230 S.W.3d 172, 174 (Tex. Crim. App. 2007); *see also* Texas Const. Article I, § 10). Absent an indictment or valid waiver, a district court does not have jurisdiction over that case. *Id.* Texas Const. Article V, § 12(b) states "An indictment is a written instrument presented to a court by a grand jury charging a person with the commission of an offense."

Here, it is undisputed that the grand jury did not indict Appellant with the counts 2 and 3 in the amended indictment. The charges were added by the District Attorney's Office without authorization from the grand jury. The return of an indictment being necessary to grant the court jurisdiction over Appellant as to

counts 2 and 3, make the judgment rendered from such unauthorized charges void. The trial court had no jurisdiction to hear charges against Appellant to which the grand jury did not charge. Judgments for counts 2 and 3 should be declared void by this Court and Appellant released from their hold on him.

PRAYER

Wherefore, Appellant prays that this Court reverse Appellant's conviction and remand his case for a new trial and declare void Appellant's convictions on Count 2 and 3 of the indictment. Alternatively, to remand the case for a new trial on the merits on all four counts.

Respectfully submitted,

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By:/s/Jacob Blizzard
Jacob Blizzard
State Bar No. 24068558
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

A copy of this notice is being filed with the appellate clerk in accordance with rule 25.1(e) of the Texas Rules of Civil Procedure. I certify that a true copy of this Appellant's Brief was served in accordance with rule 9.5 of the Texas Rules of Appellate Procedure on each party or the attorney for such party indicated below by electronic service.

/s/Jacob Blizzard
Jacob Blizzard

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 2,591 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/Jacob Blizzard
Jacob Blizzard

ACCEPTED
11-18-00184-CR
ELEVENTH COURT OF APPEALS
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CLERK

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NO. 11-18-00184-CR

IN THE COURT OF APPEALS

ELEVENTH JUDICIAL DISTRICT OF TEXAS

AT EASTLAND, TEXAS

****

HAROLD GENE JEFFERSON,
Appellant,

V.

THE STATE OF TEXAS,
Appellee.

****

On Appeal From
The 104th Judicial District Court of Taylor County, Texas
Honorable Lee Hamilton, Judge Presiding
Trial Court Cause Number 20708-B

****

STATE'S BRIEF

****

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STATE REQUESTS ORAL ARGUMENT

NO. 11-18-00184-CR

****

HAROLD GENE JEFFERSON

V.

STATE OF TEXAS

****

IDENTITY OF PARTIES AND COUNSEL

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Harold Eugene Jefferson

Appellee:

State of Texas

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Presiding Judge:

Honorable Lee Hamilton
104th District Court
Taylor County Courthouse
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NO. 11-18-00184-CR

IN THE COURT OF APPEALS

ELEVENTH JUDICIAL DISTRICT OF TEXAS

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****

STATE'S BRIEF

****

TO THE HONORABLE COURT OF APPEALS:

Comes now the State of Texas, by and through her Assistant Criminal District Attorney, Britt Lindsey, and would show this Court the following.

STATEMENT OF THE CASE

This is an appeal from convictions for three counts of sexual assault and one count of indecency with a child. Punishment was assessed at 35, 45, 45, and 25 years, to run concurrently. Appellant appeals in two points

of error, arguing ineffective assistance of counsel and that the counts added by the amended indictment are void.

ISSUES PRESENTED

Response to Issue One

A. Appellant's trial counsel did introduce evidence that Appellant had erectile dysfunction. The evidence Appellant complains was not adduced would have done more harm than good.

B. It cannot be said that "no possible basis exists in strategy of tactics exists" for choosing to proceed on the amended indictment, or that "no reasonable trial counsel" would have made the choice to demand the additional ten days to prepare and proceed without further delay while Appellant was in jail awaiting trial.

Response to Issue Two

There is no error when a defendant proceeds under an amended indictment without objection. No court has held that Tex. Code Crim. Proc. Ann. art. 28.10 is unconstitutional in allowing the amendment of an indictment without the authorization of the grand jury.

STATEMENT OF FACTS

Harold Gene Jefferson (Appellant) was charged on January 12, 2017 in a two count indictment for sexual assault and indecency with a child by contact, with two felony priors alleged in each count. (CR: 11-12) Count one alleged that he intentionally and knowingly caused the penetration of the female sexual organ of CNM, a child younger than 17 years of age, with his male sexual organ. (CR: 11) Count two alleged that he intentionally and knowingly touched the breast of CNM, a child younger than 17 years of age, with the intent to gratify his own sexual desire. (CR: 12)

The State filed a motion to amend the indictment on June 4, 2018, requesting to add two new counts to the indictment alleging that Appellant intentionally and knowingly caused the mouth of CNM, a child younger than 17 years of age, to contact his male sexual organ, and that Appellant intentionally and knowingly caused the female sexual organ of CNM, a child younger than 17 years of age, to contact his own mouth, with two priors again alleged in each count. (CR: 42-49) The court granted the motion. (CR: 50) Appellant's trial counsel filed a motion on June 7 demanding that the court postpone the trial setting for ten days so

that Appellant could respond to the amended indictment pursuant to Art. 28.10(a). (CR: 51-52) The court granted this motion. (RR2: 53)

A jury trial commenced on June 25, 2018. (RR2: 1) The State first called Detective Paul Martinez.

Testimony of Detective Paul Martinez

Abilene Police Department Detective Paul Martinez is with the Criminal Investigations Division and the Crimes Against Persons Unit. (RR3: 21) The investigation began when CNM ran away. (RR3: 23) After being found by a patrol officer, she made an outcry to another officer. (RR3: 23) Another officer took her statement and arranged for a Sexual Assault Nurse Examination (SANE). (RR3: 23) The case was assigned to another detective, and Detective Martinez took over on May 9, 2016. (RR3: 23) CNM that the sexual assault took place on or about February 6, 2014 at 2233 North Mockingbird by a black male she knew whose first name was Harold. (RR3: 24) When Detective Martinez investigated he found phone calls to police made by Appellant from that address stating that a black female had taken his vehicle. (RR3: 24-25) The call log of Appellant's call was entered as State's exhibit 1. (RR3: 35-27) (SX: 1) Detective Martinez obtained a sample of Appellant's DNA pursuant to a

search warrant and sent it to a lab for comparison with a swab taken during the sexual assault examination. (RR3: 27-30) CNM picked Appellant out of a photographic lineup. (RR3: 30-36) A recording of the photo lineup was entered as State's exhibit 2. (RR3: 36) (SX: 2) A warrant for Appellant's arrest was issued and Appellant was taken into custody, where an additional DNA sample was obtained by Detective Martinez pursuant to a search warrant. (RR3: 39)

Testimony of Officer Brent Payne

Abilene Police Department Officer Brent Payne stated that he was flagged down by Wesley Mashburn at a stoplight and asked for assistance in locating his runaway daughter, who he believed was in a house across the street. (RR3: 42-43) The address of the house was 2233 North Mockingbird. (RR3: 44) A woman in her 20s answered the door and said that the runaway was there the night before with a bunch of kids but was no longer there. (RR3: 44-45) Officer Payne asked if he could come in and look, and the young woman agreed. (RR3: 45) He found CNM lying fully clothed asleep on a double bed in the front bedroom. (RR3: 45, 55) A black male was lying on a twin mattress in the same room. (RR3: 46) He did not identify the young woman or the black male. (RR3: 48) The child did not

want to go with her father. (RR3: 47, 58) He returned the child to her father and drove on. (RR3: 48) On cross-examination he acknowledged that it was possible that the woman who answered the door did not know that CNM was there. (RR3: 55) He did not believe Appellant was the black male that he saw but could not say for certain. (RR3: 57)

Testimony of Sylvia Brown

Sylvia Brown testified that she is Appellant's niece. (RR3: 63) She lived at 2233 North Mockingbird in February 2014 and was the woman who answered the door for Officer Payne. (RR3: 63-64) She testified that she told him that her uncle was there, and that another person was there the previous night but she didn't know if she was still there. (RR3: 65) She testified that two people came over the previous night at about midnight to 1 am, a young lady and an older lady. (RR3: 65-66) Ms. Brown gave them some food and told them that they could sleep there. (RR3: 66-67) They slept in the bedroom with Appellant. (RR3: 67) At about 3 or 4 am the older woman got into an argument with Appellant over money, and he told her that she had to go. (RR3: 67) Ms. Brown said that she did not know the young girl stayed until the officer knocked on the door. (RR3: 67-68) She said that she saw Appellant in the room when

Officer Payne opened the door. (RR3: 69) On cross-examination she testified that the girl did not appear to have been assaulted or afraid. (RR3: 73) Call sheet logs indicated that Mr. Mashburn called on February 6 at 9:45, that he flagged Officer Payne down at 10:23, and that he completed the call at 10:41. (RR3: 138-142)

Testimony of Judy LaFrance, Registered Nurse

Judy LaFrance is a Registered Nurse and a Sexual Assault Nurse Examiner (SANE) for Hendrick Medical Center in Abilene. (RR3: 84) She has conducted over 350 sexual assault examinations. (RR3: 86) She conducted a sexual assault examination of CNM on February 6, 2014. (RR3: 87) She testified that the child told her:

> My dad found me at [Appellant's] house. He took me to Serenity House to get a drug screen and then brought me here for a rape kit because I had sex with a 60-year old man. She indicated it was [Appellant]. [Appellant] bought a lot of crack and gives me some if I have sex with him. I've been at [Appellant's] house for two days. We both smoked crack and had sex a lot of times. This drug dealer, Cam, came over. He's been trying to have sex with me for a couple of weeks. He gave me crack to have sex with him and we had sex once this morning.

(RR3: 88-89) She indicated that the sexual assault was at approximately 2 am on February 6th. (RR3: 89) She told Ms. LaFrance that there was penetration of her female sexual organ and that Appellant

made her perform oral sex on him. (RR3: 89) She indicated that she thought Appellant bit her in the genital area. (RR3: 90) She did not know if he ejaculated. (RR3: 90) She said no contraceptives were used. (RR3: 90) Appellant used Jergen's cocoa butter as a lubricant, which Ms. LaFrance said was a detail that lended her version of events credibility. (RR3: 90) She did not have a tampon in and was not menstruating. (RR3: 90) She did not feel like she was injured. (RR3: 90) She indicated she had not had sexual intercourse before. (RR3: 91)

Ms. LaFrance collected several swabs during her examination, including oral swabs, vaginal swabs, anal swabs, and swabs from both breast areas, as well as combings of her pubic hair. (RR3: 91) She looked for signs of trauma and saw lots of marks on her forearms and thighs that looked self-inflicted; CNM admitted that she cuts herself sometimes. (RR3: 97) She had a small contusion just under the clitoral hood, and a cyst on her labia majora that had an abrasion in the center of it. (RR3: 97) She testified that these can be a result of blunt force trauma caused by missing the vagina during penetration or oral or manual manipulation that was too rough. (RR3: 98) The injuries were consistent with the timeline that she gave of when the assault occurred. (RR3: 98-99) Photos

of the examination were entered as State's exhibits 5 through 60. (RR3: 101-102) (SX: 5-60) She discussed what they showed. (RR3: 102-109) She identified State's exhibit 61 as the evidence collection kit that was used in CNM's case. (RR3: 110) (SX: 61) It contained each of the swabs and smears that she collected. (RR3: 111-114) (SX: 61a, 61b)

On cross-examination she agreed that CNM did not tell her that Appellant touched or placed his mouth on her breast. (RR3: 117-118) She agreed that CNM related that she had been diagnosed with bipolar disorder. (RR3: 121) She agreed that her report indicated no acute trauma to her hymen, vagina, cervix, perineum, or anus. (RR3: 122-125) She agreed that a drug test provided by the father indicated that CNM tested positive for cocaine. (RR3: 128-129) On redirect, Ms. LaFrance agreed that semen was not found after every rape and that semen might not be present if the assailant had a medical problem making it difficult to ejaculate or if he had been under the influence of something. (RR3: 130-131) She agreed that CNM showed trauma to the labia and clitoral hood. (RR3: 132-133)

On recross, she agreed that the cyst was not caused by the sexual assault. (RR3: 134-135) She was asked what "impotency" meant and

stated that it was the inability of a man to become erect. (RR3: 136) She was asked if penetration could occur if a man was impotent and said that it could, explaining "[p]enetration is anything beyond the labia majora. Sexual assault is penetration of anything beyond the labia majora. It doesn't say that it has to be with the penis. It could be with the mouth, hand, object. Even a penis that is not erect can cause damage and have motion and contact beyond the labia majora." (RR3: 136-137)

Testimony of Gema Guerra, DPS forensic scientist

Gena Guerra is a forensic scientist at the Lubbock Crime Lab for Texas Department of Public Safety, where she performs serology and DNA analysis. (RR3: 145) She discussed her training and qualifications, as well as the process of DNA analysis. (RR3: 145-149) She identified a laboratory report that she created on March 10, 2014 using the DNA evidence collected from CNM, which was entered as State's exhibit 62. (RR3: 151-152) (SX: 62) The buccal swabs collected from Appellant were not collected until November 21, 2016 and were not referenced in the original report, (RR3: 152) Semen was not detected in the vaginal swabs, vaginal smears, anal swabs, or breast swabs. (RR3: 152-153) There was no indication of semen on CNM's pants or shirt. (RR3: 153) On cross-

examination she noted that the date of offense on her report was February 2, 2014, which she said was the date that she was given by the agency. (RR3: 156)

Recall of Detective Paul Martinez

Detective Martinez was recalled and identified State's exhibit 64, a videotape copy of the interview he conducted with Appellant. (RR3: 11) (SX: 64) The interview was published to the jury. (RR3: 11-12) He identified the buccal DNA swab that he took from Appellant during the interview. (RR5: 12) It was admitted as State's exhibit 64. (RR5: 13) (SX: 64)

In the interview Appellant denied knowing or hanging out with a younger white female and denied knowing a Patricia Markham. (RR5: 14) Detective Martinez testified that he was telling the truth in the interview when he told Appellant that Ms. Markham had made a police report against him. (RR5: 14) He explained that she had done so the same day that they found CNM and that Ms. Markham was in Appellant's house that day. (RR5: 14) The case was never followed up on because Ms. Markham did not want to file charges. (RR5: 14) Detective Martinez said that he considered Appellant a liar. (RR5: 15) He asked Appellant about

the address of 2233 North Mockingbird and Appellant claimed to not know what he was talking about. (RR5: 15)

On cross-examination Detective Martinez was asked if he did not also lie to Appellant that he had been identified as the man in the room by Officer Payne. (RR5: 16-17) He was asked if based on the description if it were possible that the man on the floor could have been "Cam." (RR5: 20-21) He was further asked:

> Q. During the interview, did Harold tell you that he was impotent?
>
> A. He brought it up, yes.
>
> Q. That he has been diagnosed with impotency?
>
> A. He said he could not ejaculate, yes.
>
> Q. Did he tell you that he couldn't even achieve an erection?
>
> A. I don't remember if he said that specifically, but that was the impression that I heard. That's what I remember or that's how I took it.
>
> Q. Didn't he tell you and you understand him to be saying that he could not have sexual intercourse because he could not achieve an erection?
>
> A. That's what he said.

(RR5: 22) He was asked if he was aware than CNM had "lied about an assault from her father, that she falsely accused him of assaulting

her?" and responded "[n]o, sir." (RR5: 24) He said that he did not show Appellant a photograph of CNM to see if he recognized her. (RR5: 30)

Appellant's counsel showed Detective Martinez a copy of the lineup creation form shown to CNM and asked who filled in the subject description blanks on the form. (RR5: 31-32) (DX: 5) Detective Martinez was not sure which of them filled in the form. (RR5: 32) He agreed that it appeared that CNM filled in the blanks with her own description. (RR5: 33) He agreed that twenty-seven months passed before a statement was obtained from CNM and that that was not customary. (RR5: 35) He explained that he was not the detective originally assigned the case, and said that it also took several months to find CNM. (RR5: 36-37)

He agreed that CNM's foster parent Patricia Markham was a drug user and that she got CNM addicted to cocaine. (RR5: 39-40) He said that he was about to file charges on her when he learned that she was deceased. (RR5: 40) He was asked if he learned in his investigation that Ms. Markham sold CNM to people for sex in exchange for drugs and said that he did learn that. (RR5: 40) He said that he located Appellant in the VA hospital in Big Spring, where he was being treated for drug addiction. (RR5: 42)

Testimony of CNM

CNM took the stand to testify. (RR5: 48) She was 19 years old at the time of trial. (RR5: 48-49) She stated that at the end of December, 2013 that she had just turned 15 years old. (RR5: 50) She was asked if she had a normal childhood and testified that she did not because both of her parents were severe drug addicts. (RR5: 50-51) She testified that she met Patricia Markham while living with her father's girlfriend at the Jubilee, a halfway house. (RR5: 52) Ms. Markham was married to Terry Markham, who operated the halfway house. (RR5: 53, 56) After that she went to live with her grandfather. (RR5: 54) She maintained contact with Patricia Markham, saying that "she was like a mom" and would cook and do laundry for her. (RR5: 54-55)

Sometime around spring break in 2013, she moved out of her grandfather's apartment and began hanging out with Ms. Markham more. (RR5: 55-56) Ms. Markham introduced her to crack cocaine. (RR5: 55-56) She said she got hooked after the first hit. (RR5: 56) She had already known Patricia to have a drug problem and had seen her have binges and sell her car title for drugs. (RR5: 56-57) After she began using she went back to live with her father for a while, but his own problems

with drugs caused him to become violent with her. (RR5: 57-58) She returned to Ms. Markham, and then lived with her mother. (RR5: 58) Her mother was ill and also had a drug problem, so after a month she returned to Ms. Markham. (RR5: 59) Ms. Markham had just bought a house and was not using, so everything was fine initially; CNM said "[w]e were actually like a nice little family for a minute." (RR5: 59) She thought of her "as a mom." (RR5: 60)

After Ms. Markham's dog died she began using crack cocaine again, and so did CNM. (RR5: 61) Ms. Markham began stealing to get money for drugs, and the two stayed at a drug dealer's house. (RR5: 62) She met Appellant at the drug dealer's house, and she and Ms. Markham left with Appellant. (RR5: 62) They had run out of money, and Ms. Markham had been trying to get CNM to have sex with people for money. (RR5: 64) They went to a house with Appellant and smoked, and Appellant told Ms. Markham that he wanted CNM and gave her money. (RR5: 64) She testified "I just remember being extremely messed up in the kitchen and him touching on me saying that I was his now." (RR5: 64) They got into his car and went to his house on Mockingbird. (RR5: 65)

She testified that they smoked again and everything was "just a blur." (RR5: 66) They had sex several times and he had her perform oral sex on him. (RR5: 66) He said that he would give her more drugs in return. (RR5: 67) She told him that she was 15 years old but he did not care. (RR5: 67) She testified that he had erectile difficulties: "I would just remember him trying to make me get him hard because – I don't know. It didn't happen – it didn't happen a lot. Like, it happened maybe once or twice where he got a full erection, and that's when he wanted to have sex. But most of the time it was just me giving him head." (RR5: 68) She later testified in greater detail and said that he was only able to achieve a full erection two or three times. (RR5: 77-78)

She testified that he also performed oral sex on her and contacted her female sex organ with his mouth. (RR5: 69) He touched her breasts with his hand. (RR5: 69) She did not remember him putting his mouth on her breasts but said "obviously it did happen if y'all found the DNA on me. I just don't remember." (RR5: 69)

She testified that she had sex with another male around this time, a man she knew as "Cam" who promised to give her crack in return. (RR5: 70) He did not have a condom so he used a Walmart bag. (RR5: 71) He

kept telling her that she was "going to learn," and she didn't know what that meant. (RR5: 71) She was asked if Appellant was present, and replied "[y]es, he – he had set all of this up" and that he was sitting in the room. (RR5: 71) She said that there were other men, more than two but she didn't believe it was as many as five. (RR5: 72-73) She said everything was a blur because she was not allowed to be sober. (RR5: 73) She was asked if she ever fought or resisted and said "I had no energy. I hadn't slept in days. I couldn't put up a fight even if I tried to. Even if I wanted to, I couldn't. I was so weak. I hadn't eaten or slept. My body was running on drugs. But I did say that I didn't want it. I told them I wanted them to stop." (RR5: 73) She was asked if they did stop and indicated that they did not and that they kept giving her drugs. (RR5: 73)

She testified that the next day Appellant told her that she needed to get her clothes and leave, and when she did she saw a police officer at the door who said that her father was there. (RR5: 74) She did not want to go with her father because she was scared but did anyway. (RR5: 74-75) She was wearing one of Appellant's white shirts. (RR5:74) He got in the car with her and told him what had happened. (RR5: 75) She said they cried

and that he was devastated. (RR5: 75) He took her to Serenity House for a drug test, then to Hendrick for a sexual assault examination. (RR5: 76)

On cross-examination, she testified that she never used drugs with her father and had never done "speed" or heroin. (RR5: 81) She agreed that she did go to CPS because her father assaulted her but said that she did not file charges. (RR5: 82) She agreed that CPS approved her placement with Patricia Markham and that she did not tell them that Ms. Markham was addicted to crack cocaine. (RR5: 82-83) She said that she was 14 when she first smoked crack cocaine. (RR5: 83-84)

She agreed that she had had sex with "Cam" in the bedroom at the Mockingbird house but could not say when it was specifically. (RR5: 86) She agreed it was sometime before dawn that morning. (RR5: 88) She said that he achieved an erection and penetrated her but she did not know if he ejaculated. (RR5: 88) She did not think he touched her breast. (RR5: 88) She said Appellant was sitting in the corner during this. (RR5: 88) She did not know how many people that she had sex with. (RR5: 89)

She testified that she was at the Mockingbird house for two or three days. (RR5: 89) She was asked if it was her testimony that she, Appellant and Ms. Markham all three had sex in the bed together and said that it

was. (RR5: 90-91) She agreed that she did not tell police that when questioned and did not put it in her statement. (RR5: 91) She said that she told them about Cam because it was memorable but that Ms. Markham didn't cross her mind. (RR5: 91-92) She was asked why the police officer said that she was clothed in the bed and said that she did not know. (RR5: 92) She was asked if he came to the bedroom door and said that he did not. (RR5: 92-93) She was told that Officer Payne testified under oath that he did so and saw her clothed on the bed and said that that was not right. (RR5: 94)

She said that she didn't tell her father what happened that day because she was scared. (RR5: 94-95) She said that she first spoke about it when admitted to rehab. (RR5: 96) She did remember telling the Nurse LaFrance about it. (RR5: 96) On redirect, she clarified that she didn't tell her father, but that "he already knew I was messed up, like, I was on drugs and stuff, and he already figured what had happened." (RR5: 107)

Testimony of Brent Hester, DPS forensic scientist

Brent Hester is a forensic scientist at the Texas Department of Public Safety Lubbock Crime Lab. (RR5: 110) He is a trainer and performs DNA analysis. (RR5: 111) He described his education and

training. (RR5: 111) He explained the process of DNA analysis. (RR5: 113-116) He identified buccal swabs for CNM and Appellant that were tested by his lab. (RR5: 117-118) He also identified swabs from the left and right breasts of CNM. (RR5: 119)

He identified his report, which was admitted as State's exhibit 65. (RR5: 121) He said that the report shows that the known samples from CNM and Appellant were compared to the breast swabs taken from CNM. (RR5: 121-122) He testified that his conclusion was "[t]he DNA profile is interpreted as a mixture of two individuals with Victim [CNM] as an assumed contributor. Obtaining this profile is 181 quadrillion times more likely if the DNA came from Suspect Jefferson than if the DNA came from [CNM] and one unrelated, unknown individual. Based on the likelihood ratio result, Jefferson cannot be excluded as a possible contributor to this profile." (RR5: 122) He was asked how much bigger a quadrillion is than a billion and said "a thousand billions is a trillion; a thousand trillions is a quadrillion. So it would be a thousand, thousand times bigger." (RR5: 122-123) On cross-examination, he agreed that the DNA found on the breast swabs could have been saliva, urine, perspiration, or oil from a person's skin. (RR5: 131) He agreed that DNA

could be deposited by another method other than by a person touching her breast, such as touching her hand and CNM touching her own breast. (RR5: 132) After his testimony the State rested.

Testimony of Wesley Mashburn

Appellant called Wesley Mashburn, who is the father of CNM. (RR5: 148) He testified that his daughter left with him willingly. (RR5: 151) He testified that he took her to Serenity for a drug test, then to the hospital for a sexual assault examination. (RR5: 152) She told him that she was molested by two men at the house but did not give names. (RR5: 152) He was asked if she said those two men were still at the house and replied "[y]es. She told me that she heard them talking on the phone that she was going to be sold to some individuals coming from the Metroplex the next day as a sex slave." (RR5: 152) He said that she told him that the two men who molested her were black, that they were brothers, and that they were still there. (RR5: 153)

Recall of Sylvia Brown

Sylvia Brown was recalled, and testified that she lives at the Mockingbird house with her boyfriend Dwayne Turner. (RR5: 155) She said Mr. Turner is her boyfriend and is unrelated to Appellant. (RR5:

155) She testified that the young girl and the older lady came to her house at about midnight to 1:00 on February 6. (RR5: 156) She said that it was just the three of them. (RR5: 156) She testified that she made them food and told them that they could stay the night. (RR5: 156)

She said that after the three of them went into Appellant's room that she heard no unusual noises and that nothing happened to arouse her attention or make her suspicious. (RR5: 156) She was asked if Appellant brought the two to her house on the 5th or the 4th and said "[n]o." (RR5: 157) She was asked if somebody testified to that if she would disagree and said "[t]hat's not true." (RR5: 157) She was asked who was at the house after she left and said only herself and Appellant. (RR5: 157) She was asked if CNM said that there were two black males in the house and said that that was not true. (RR5: 157-158) She said that she does not know anybody named Cam and that both Appellant's and her boyfriend's brothers were deceased. (RR5: 158) She said that nobody came to the house while they were in the bedroom, and that she sleeps on the couch and would have known if somebody had. (RR5: 158-159) She said that her boyfriend was never in the room with them and that he left

for work early. (RR5: 159) She said that Appellant had received radiation treatment for prostate cancer. (RR5: 160-161)

Closing argument, verdict and sentence

In closing argument, Appellant's counsel argued that the testimony of CNM was not supported by the other witnesses. He pointed out that: CNM testified that she was in the house for one or two days, and Sylvia Brown testified that that was not true. (RR5: 201) He noted that Officer Payne testified that he saw CNM clothed in the bed and another man who was not Appellant lying on a mattress, which was contrary to CNM's earlier testimony. (RR5: 202) He pointed out that Appellant's father said that there were two black males still in the house, and that neither Ms. Brown nor Officer Payne testified that there were two black males present. (RR5: 202) He pointed out that Appellant's testimony that she had gotten in a threesome with Ms. Markham and Appellant was never reported to police or to her father. (RR5: 202) He discussed how CNM was addicted to crack, "messed up" by her own account, and questioned her memory of events. (RR5: 203)

After hearing evidence and argument, the jury found Appellant guilty of sexual assault as charged in counts one, two, and three of the

indictment, and indecency with a child by contact as charged in count four of the indictment. (RR5: 224-225) Following a punishment hearing the jury sentenced Appellant to 35 years, 45 years, 45 years, and 25 years confinement in TDCJ-ID on counts one through four respectively. (RR6: 77) (CR: 89-96)

Motion for New Trial

Appellant filed a motion for new trial, alleging that Appellant's trial counsel was constitutionally ineffective. (CR: 110-117) Appellant's chief complaints were that counsel did not seek to admit medical records and expert testimony regarding Appellant's treatment for impotence, and that Appellant was unaware of the amended indictment prior to trial. (CR: 110-117) A hearing on the motion was held on August 17, 2018. (Supp. RR2: 1)

Testimony of Dr. Imran Yazdani

Appellant presented the testimony of Dr. Imran Yazdani, a doctor employed with the Veterans Affairs Outreach Clinic in Abilene. (Supp. RR2: 8-9) He was a treating physician for Appellant at the VA clinic. (Supp. RR2: 9-10) He testified that Appellant was diagnosed with high blood pressure, high cholesterol, mental health issues, erectile

dysfunction, and some substance issues. (Supp. RR2: 11) He also suffered from prostate cancer at one point, for which he received radiation treatments. (Supp. RR2: 12-13) He testified that 35 to 40 percent of patients may have erectile dysfunction after prostate cancer treatment. (Supp. RR2: 14-16) He testified that Appellant had a number of other factors which can contribute to erectile dysfunction, such as high blood pressure, high cholesterol, mental health issues, mental health medication, and substance use. (Supp. RR2: 19-20) He noted that Appellant's records stated that he was prescribed Levitra and that Appellant reported that it "did not work." (Supp. RR2: 22) Appellant was first prescribed an increased dosage, then switched to Viagra. ((Supp. RR2: 22-23) He testified that he was not contacted by Appellant's counsel. (Supp. RR2: 29)

On cross-examination he agreed that Appellant was given a normal, therapeutic dosage of the medications. (Supp. RR2: 33-34) He agreed that after the dosage was increased and Appellant was switched to Viagra that he continued asking for the medication until 2016 and did not ask that the dosage be further increased. (Supp. RR2: 34-35) He was asked if under these circumstances "we can assume that the dose is working,

right?" and responded "[y]es." (Supp. RR2: 35) He agreed that Appellant's medical records also stated that he had been diagnosed with chronic antisocial personality disorder. (Supp. RR2: 37-38)

Testimony of Lynn Ingalsbe, Appellant's trial counsel

Appellant's trial counsel Lynn Ingalsbe was called to testify. (Supp. RR2: 50) He testified that he had given the case file to Appellant's new counsel. (Supp. RR2: 51-52) He testified that the State's original offer of 30 years "decreased to ten years as a result of some glitches that occurred during the trial, and I told Mr. Jefferson I thought it was a very reasonable offer and that he should take it, but he refused." (Supp. RR2: 56) He testified Appellant said that he didn't do it, that it was a bogus charge, and that he did not believe CNM or the other witnesses would come to trial and testify. (Supp. RR2: 57) He testified that Appellant said that he had prostate cancer but never told him about erectile dysfunction until the day of trial. (Supp. RR2: 57)

He testified that he did receive discovery and did go over it with Appellant. (Sup. RR2: 59-60) He testified that Appellant told him that witnesses would testify that he was never alone with CNM to the point where any of this happened, such as his niece, his sister, and her

boyfriend. (Supp. RR2: 61-62) He was asked why he did not pursue the defense that he could not have committed the offense due to erectile dysfunction and replied "[h]e didn't tell me until the day of trial that he had erectile dysfunction. What he told me previously during one of our visits was that he had been diagnosed with prostate cancer. He never said that it resulted in erectile dysfunction, and for that matter, there's only one of the four counts that that would have been a defense to any way." (Supp. RR2: 62) He said that had Appellant told him that early on he would have wanted to pursue it. (Supp. RR2: 63) He did not specifically recall Appellant claiming that he was impotent from the video and did not remember arguing Appellant's impotence at trial. (Supp. RR2: 64) He was asked about the possibility of securing an expert to testify about erectile dysfunction and replied:

> No. I'm not aware of whether or not there are experts able to give that opinion. The -- only one of the four counts accused him of penetrating her female sexual organ with his sexual organ, and even testimony about erectile dysfunction that would negate the possibility of that occurring would have had no relevance whatsoever to the other three counts upon which he was convicted. And so it was -- in the first place, he never told me that he had erectile dysfunction other than what's in that tape and his – told me he had prostate cancer. His – he – he simply said he didn't do it, that he did no sexual acts with a girl at all. But he was also accused in the other three counts of touching her breasts with an attempt to arouse

> and gratify his sexual desire as well as her touching him – his private parts [with] her mouth and him touching her private parts with his mouth, against which erectile dysfunction would have no bearing.

(Supp. RR2: 67-68) He testified as regards the motion to amend that it was granted after a hearing at which he objected and for which Appellant was present. (Supp. RR2: 69-70) He testified that Appellant was given a copy of the amendments and that it was discussed at the hearing and at their next meeting. (Supp. RR2: 71) He denied Appellant expressing surprise when the indictment was read and said that it did not happen. (Supp. RR2: 72) He testified as to his discussions with Appellant about the benefits and risks of testifying, and testified as to Appellant's allegation that he revealed confidential information to the district attorney. (Supp. RR2: 72-78)

On cross-examination, Mr. Ingalsbe related that he had been a board certified criminal defense attorney since 1979 and had held office as the criminal district attorney for the 42nd and 104th districts and as a county court at law judge. (Supp. RR2: 82) He testified that he had provided good representation, as Appellant received the minimum on one charge and had not received the maximum on any of them in spite of his criminal history. (Supp. RR2: 82) He said that Appellant told him that he

did a good job during trial. (Supp. RR2: 88) He was asked if the medical records showing that he was a sociopath and was disciplined in the military might be detrimental if shown to the jury and replied "[a]bsolutely, and particularly if those records show a diagnosis from a medical professional of chronic antisocial personality disorder, it would be devastating." (Supp RR2: 94)

Testimony of Harold Jefferson, Appellant

Appellant testified that his trial counsel "really wasn't interested. He was more interested in telling me what the DA had, that they had my DNA, and he more or less bullied me trying to get me to – I would say trying to get me to crack or ask for a plea bargain, and I wouldn't, so he never talked too much about the case." (Supp. RR3: 10) He said that he didn't think Mr. Ingalsbe got the discovery and never told him that he did. (Supp. RR3: 10) He said Mr. Ingalsbe insinuated that he had something to do with Patricia Markham's death. (Supp RR3: 15) He said that they never discussed trial strategies. (Supp. RR3: 15)

He said that he told Ms. Ingalsbe about his erectile dysfunction the first day that they met. (Supp. RR3: 16-17) He said that he offered to get tested to prove that he was impotent and to prove that the DNA was not

his own. (Supp. RR3: 17) He said that he asked Mr. Ingalsbe for a bond reduction and never got a reply. (Supp. RR3: 19)

He testified that he first saw the motion to amend the indictment on the 20th when Mr. Ingalsbe came to the jail before the trial. (Supp. RR3: 21-22) He said that he did not know that the indictment had gone from two counts to four counts until he arrived at court and the indictment was read. (Supp. RR3: 22) He was asked to clarify whether trial counsel discussed it with him at the jail and said he did not. (Supp. RR3: 22) He said that Mr. Ingalsbe never showed him any reports or statements, and that he requested another lab test to show that the DNA was not his. (Supp. RR3: 24) He said that when he said that he wouldn't testify that he noticed that the district attorneys were visibly pleased. (Supp. RR3: 26) He had complaints regarding some of the testimony of Nurse LaFrance. (Supp. RR3: 30)

He testified that he has congestive heart failure, hypertension, had received radiation therapy for prostate cancer, and had been diagnosed with erectile dysfunction. (Supp. RR3: 36) He testified that he was unable to have sex at all. (Supp. RR3: 38) He testified that he was afraid of Viagra because it can cause organ failure and cardiac arrest, but that he

had tried it anyway and is still didn't work. (Supp. RR3: 38-39) He testified that he continues to receive prescription medications that he doesn't use and throws them away. (Supp. RR3: 39)

He denied ever being read the discovery or discussing it. (Supp. RR3: 41-42) He testified that he told Mr. Ingalsbe that he didn't get out of the penitentiary until the 8th and Mr. Ingalsbe only responded that this case happened on the 6th. (Supp. RR3: 42) He said that Mr. Ingalsbe was "more like a prosecutor than he was a defense lawyer," that he never explained anything to him, and that he never showed him any kind of evidence. (Supp. RR3: 42) He claimed Mr. Ingalsbe stole all of the money from his bank account. (Supp. RR3: 43)

Testimony of Frankie Ware

Ms. Ware is Appellant's sister. (Supp. RR3: 44) She testified that they told Mr. Ingalsbe about Appellant's prostate cancer and that maybe he could get his medical records. (Supp. RR3: 47) She was asked if she told him about his erectile dysfunction and testified "I think my sister did mention it." (Supp. RR3: 47) She said Mr. Ingalsbe told them to get his medical records. (Supp. RR3: 47)

After hearing evidence and argument, the court took the matter under advisement. (Supp. RR3: 88) The court denied Appellant's motion for new trial by written order on September 10, 2018. (CR: 142)

SUMMARY OF ARGUMENT

As Appellant's trial counsel noted, even if Appellant's erectile dysfunction was completely resistant to treatment and prevented him completely from ever achieving an erection it would only have had bearing on one count of the indictment, and even as to that count would not be proof that the offense did not occur. Appellant's counsel did introduce testimony that Appellant suffered from erectile dysfunction, and attempted to elicit further testimony that was not admitted. The method in which Appellant's counsel introduced evidence of impotence at trial is preferable to that suggested by Appellant on appeal, as the medical testimony and medical records presented by Appellant in the motion for new trial hearing would have actually been detrimental to Appellant's case. The medical testimony presented by Appellant at the hearing established not only that Appellant suffered from erectile dysfunction, but that he was receiving treatment and medication for it that appeared to be working. This would have lent credence to CNM's

testimony; she testified that Appellant had difficulty achieving an erection, but was able to do so with stimulation. Finally, the testimony and medical records entered at Appellant's motion for new trial hearing contained other information that would have been detrimental to Appellant if introduced before the jury: that Appellant had been diagnosed with chronic antisocial personality disorder. Appellant's counsel described this diagnoses as "devastating."

Appellant argues that his trial counsel was constitutionally ineffective in either not objecting to the amended indictment or not preserving his objection on the record. Appellant's trial counsel stated that he did so object, but appears to have been referring to his demand for 10 additional days to prepare. Appellant's trial counsel's conduct in proceeding with the trial was objectively reasonable, in that the defense in all four counts was exactly the same: that CNM was untruthful and that none of the offenses happened. It cannot be said that "no possible basis exists in strategy of tactics exists" for choosing to proceed on the amended indictment, or that "no reasonable trial counsel" would have made the choice to demand the additional ten days to prepare and proceed without further delay while Appellant was in jail awaiting trial.

Moreover, there is no showing of a reasonable probability that the result of the proceeding would have been different had Appellant's counsel objected.

Appellant argues that his convictions on the counts added by amendment are void under the Texas Constitution. No court has held that Article 28.10 is unconstitutional in allowing the amendment of an indictment without the authorization of the grand jury, and no objection by Appellant to proceeding on the amended indictment appears on the record.

ARGUMENTS AND AUTHORITIES

Response to Issue One

A. Appellant's trial counsel did introduce evidence that Appellant had erectile dysfunction. The evidence Appellant complains was not adduced would have done more harm than good.

B. It cannot be said that "no possible basis exists in strategy of tactics exists" for choosing to proceed on the amended indictment, or that "no reasonable trial counsel" would have made the choice to demand the additional ten days to prepare and proceed without further delay while Appellant was in jail awaiting trial.

Standard of review – ineffective assistance

To prevail on an ineffective assistance of counsel claim, the defendant must first show that trial counsel's performance was deficient to the extent counsel failed to function as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687-688, 694 (1984); *Jackson v. State*, 877 S.W. 2d 768, 771 (Tex. Crim. App. 1994). The second step requires the defendant to establish that counsel's deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687-688; *Jackson*, 877 S.W.2d at 771. With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 696. "The defendant must prove, by a preponderance of the evidence, that there, in fact, is no plausible professional reason for a specific act or omission." *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002).

"It is not sufficient that the appellant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence. Rather, the record must affirmatively

demonstrate trial counsel's alleged ineffectiveness." *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007). The right to "reasonably effective assistance of counsel" does not guarantee errorless counsel or counsel whose competency is judged by perfect hindsight. *Saylor v. State*, 660 S.W.2d 822, 824 (Tex. Crim. App. 1983). "Isolated instances in the record reflecting errors of commission or omission do not cause counsel to become ineffective, nor can ineffective assistance of counsel be established by isolating or separating out one portion of the trial counsel's performance for examination." *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990). Isolated failures to object generally do not constitute error in light of the sufficiency of the overall representation. *Johnson v. State*, 691 S.W.2d 619, 627 (Tex. Crim. App. 1984); *Sanders v. State*, 787 S.W.2d 435, 441 (Tex. App.--Houston [1st Dist.] 1990, pet. ref'd). The reviewing court evaluates the quality of the representation from the totality of counsel's representation rather than counsel's isolated actions or omissions. *Strickland*, 466 U.S. at 689; *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010).

A *Strickland* claim must be "firmly founded in the record" and "the record must affirmatively demonstrate" the meritorious nature of the

claim. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (quoting *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999)). To defeat the presumption of reasonable professional assistance, "any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson*, 9 S.W.3d at 814 (quoting *McFarland v. State,* 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *cert. denied,* 519 U.S. 1119 (1997)). To accomplish this, appellant must identify the specific "acts or omissions of counsel that are alleged" to constitute ineffective assistance and affirmatively prove that they fell below the professional norm for reasonableness. *McFarland*, 928 S.W.2d at 500 (citing *Strickland*, 466 U.S. at 690). The reviewing court does not inquire into defense counsel's trial strategy unless no possible basis exists in strategy or tactics for trial counsel's actions. *Johnson v. State*, 614 S.W.2d 148, 152 (Tex. Crim. App. [Panel Op.] 1981). "It is not appropriate for an appellate court to simply infer ineffective assistance based upon unclear portions of the record." *Mata*, 226 S.W.3d at 432.

Argument and Analysis

Appellant argues that his trial counsel was constitutionally ineffective in failing to present a defense that Appellant suffered from erectile dysfunction and in failing to object to the amendment of the indictment. The State will address each in turn.

A. Appellant's trial counsel did introduce evidence that Appellant had erectile dysfunction. Prejudice is not shown, as the evidence Appellant complains was not adduced would have done more harm than good.

As Appellant's trial counsel noted, even if Appellant's erectile dysfunction was completely resistant to treatment and prevented him completely from ever achieving an erection it would only have had bearing on one count of the indictment, and even as to that count would not have provided proof that the offense did not occur. Further, as Nurse LaFrance correctly pointed out, "[e]ven a penis that is not erect can cause damage and have motion and contact beyond the labia majora." (RR3: 137) The Court of Criminal Appeals has held that "penetration occurs when there is "tactile contact beneath the fold of complainant's external genitalia," and that it is not inaccurate 'to describe [conduct] as a penetration, so long as [the] contact with [the complainant's] anatomy could reasonably be regarded by ordinary English speakers as more intrusive than contact with her outer vaginal lips…. the statute does not

criminalize penetration of the *vagina*, but the broader conduct of 'penetration of the . . . sexual organ' of the child.'" *Cornet v. State*, 359 S.W.3d 217, 226 (Tex. Crim. App, 2012) (quoting *Vernon v. State*, 841 S.W.2d 407, 409 (Tex. Crim. App. 1992)) (italics in *Cornet*). An inability to maintain an erection does not mean an inability to commit sexual assault.

Moreover, Appellant's counsel did introduce testimony that Appellant suffered from erectile dysfunction, and attempted to elicit further testimony that was not admitted. Appellant questioned Nurse LaFrance about impotency and whether penetration can occur if a man is impotent. (RR3: 136-137) Appellant's counsel asked Detective Martinez if Appellant had represented that he was impotent:

> He was further asked:
>
> Q. During the interview, did Harold tell you that he was impotent?
>
> A. He brought it up, yes.
>
> Q. That he has been diagnosed with impotency?
>
> A. He said he could not ejaculate, yes.
>
> Q. Did he tell you that he couldn't even achieve an erection?

A. I don't remember if he said that specifically, but that was the impression that I heard. That's what I remember or that's how I took it.

Q. Didn't he tell you and you understand him to be saying that he could not have sexual intercourse because he could not achieve an erection?

A. That's what he said.

(RR5: 22) Appellant's counsel elicited testimony from Sylvia Brown that Appellant received radiation treatment for prostate cancer, and attempted to elicit further testimony that the treatment caused impotence:

Q. (By Mr. Ingalsbe) For what purpose did you take Harold to Hendrick Medical Center?

A. For him to get his radiation treatments.

Q. For what?

A. For prostate cancer.

Q. So do you know whether or not that diagnosis of prostate cancer has made him impotent?

MR. GORE: Objection, Judge. She's not a medical expert.

THE COURT: Response?

MR. INGALSBE: I'll rephrase.

Q. (By Mr. Ingalsbe) Was Harold going to Hendrick Medical Center for radiation treatment for his prostate cancer in early 2014?

A. Yes.

(RR5: 160-161)

The method in which Appellant's counsel introduced evidence in trial is preferable to that suggested by Appellant on appeal. The medical testimony and medical records presented by Appellant in the motion for new trial hearing would have actually been detrimental to Appellant's case, and prejudice accordingly cannot be shown. The medical testimony presented by Appellant at the hearing established not only that Appellant suffered from erectile dysfunction, but that he was receiving treatment and medication for it that appeared to be working.

Dr. Yazdani testified that Appellant was prescribed Vardenafil (Levitra), and that the dosage was increased to 20 milligrams when Appellant complained that it did not work. (Supp. RR2: 22-23) Appellant was then switched to a 50 milligram dose of Viagra, after which there were no further complaints. (Supp. RR2: 23-24) Dr. Yazdani agreed that from this we can conclude that the medication is working. (Supp. RR2: 35) Appellant was still prescribed Viagra in this dosage on the date of the

offense. (Supp. RR2: 35) Appellant admitted that he still received this prescription, but claimed that he threw it away. (Supp. RR3: 39)

Introducing evidence of Appellant's treatment for erectile dysfunction would have had the opposite effect of impeaching CNM, as it would have actually lent credence to her testimony. CNM testified that Appellant had difficulty achieving an erection, but was able to do so with stimulation:

> A. I would just remember him trying to make me get him hard because -- I don't know. It didn't happen -- it didn't happen a lot. Like, it happened maybe once or twice where he got a full erection, and that's when he wanted to have sex. But most of the time it was just me giving him head.

(RR5: 68) This confirms a detail about Appellant that she otherwise would not have known and makes her story more credible. Prejudice cannot be shown when the evidence not introduced actually confirms the victim's testimony.

Finally, the testimony of Dr. Yazdani and the medical records entered at Appellant's motion for new trial hearing contained other information that would have been detrimental to Appellant if introduced before the jury: the Appellant had been diagnosed with chronic antisocial personality disorder. *See e.g. Jenkins v. State,* 912 S.W.2d 793, 806 (Tex.

Crim. App. 1995) (testimony from psychologist that individuals with antisocial personality disorder refuse to "operate inside the law" and have no conscience); *Wilkerson v. State*, 881 S.W.2d 321, 325 (Tex. Crim. App. 1994) (testimony from psychologist that disorder "previously called sociopathic is basically one that we associate with people who are long-term criminals, that don't have the ability to view other people's feelings at all or to function in society"); *In re Commitment of Cox*, No. 09-13-00316-CV, 2014 WL 1400667, 2014 Tex. App. LEXIS 3887 (Tex. App.—Beaumont Apr. 10, 2014, no pet.) (mem. op.) (forensic psychiatrist explains antisocial personality disorder entails "breaking the rules of society, aggression towards others, stealing, lack of responsibility, callousness, those kinds of things"); *In re Reese*, No. 09-10-00492-CV, 2011 WL 4389619, 2011 Tex. App. LEXIS 7650, *8 (Tex. App.—Beaumont Sep. 22, 2011, no pet.) (mem. op.) (psychiatrist explained that antisocial personality disorder is "a lifelong pattern of unlawful behavior"); *In re Commitment of Sternadel*, No. 14-17-00051-CV, 2018 Tex. App. LEXIS 2653 (Tex. App.—Houston [14th Dist.] Apr. 17, 2018, no pet.) (mem. op.) (forensic psychologist testifies those with the disorder "have a sense of entitlement to get what they want, without regard to rules, and cannot

empathize with other people. Such people show a lack of remorse and fail to take responsibility for their actions").

Appellant's trial counsel testified that "if those records show a diagnosis from a medical professional of chronic antisocial personality disorder, it would be devastating." (Supp. RR2: 94) Appellant's counsel is correct, and prejudice is not shown.

B. Appellant's counsel demanded and received 10 addition days to prepare, and the defense to all four counts was exactly the same: that CNM was untruthful and that none of the offenses happened.

Appellant's trial counsel testified that he did object to the amended indictment. No objection appears in the record. Appellant argues on appeal that his trial counsel was either ineffective in failing to object, or ineffective in failing to make certain that the objection was on the record.

Texas Code of Criminal Procedure article 28.10, entitled "Amendment of indictment or information," provides:

> (a) After notice to the defendant, a matter of form or substance in an indictment or information may be amended at any time before the date the trial on the merits commences. On the request of the defendant, the court shall allow the defendant not less than 10 days, or a shorter period if requested by the defendant, to respond to the amended indictment or information.

(b) A matter of form or substance in an indictment or information may also be amended after the trial on the merits commences if the defendant does not object.

(c) An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced.

Tex. Code Crim. Proc. Ann. art. 28.10. Appellant's counsel states that he did object to the amendment; however, he appears to have been referring to his "Demand for Postponement" in which he demanded and received the statutory ten additional days to prepare to which he was entitled under Article 28.10 (a). (CR: 51-52)

In *Stewart v. State*, No. 05-95-01056-CR, 1997 Tex. App. LEXIS 2103 (Tex. App.—Dallas Apr. 23, 1997, no pet.), a defendant argued ineffective assistance of counsel when his trial counsel did not object to the amendment of an information under Article 28.10(c) that alleged a different offense. The Fifth Court of Appeals found that trial counsel was not ineffective under those circumstances, holding:

> It is true that the information in this case was amended to allege a different offense, and appellant's counsel might have prevented the amendment by objecting. However, it would have been a relatively simple matter for the State to obtain a new information charging appellant with deadly conduct. In addition, counsel's decision not to object may have

> been a strategic one designed to avoid unnecessary delay in the proceedings. Appellant has not identified anything in the record that would overcome the presumption that his counsel's challenged conduct can be considered sound trial strategy. When the record contains no evidence of the reasoning behind trial counsel's action, we cannot conclude that counsel's performance was deficient. *See Jackson*, 877 S.W.2d at 771. Further, appellant has not shown that his counsel's representation fell below an objective standard of reasonableness, and it does not appear that the result of the proceeding would have been different even if counsel had objected.

Stewart at *10-11. In the instant case, trial counsel's reasoning for not objecting to the indictment was not explained; trial counsel testified that he did object, and the mistake was never clarified. Trial counsel may have had a reason for not objecting, such as avoiding unnecessary delay, that was not articulated or elicited through direct of cross-examination. Appellant's trial counsel's conduct was objectively reasonable, in that the defense in all four counts was exactly the same: that CNM was untruthful and that none of the offenses happened. It cannot be said that "no possible basis exists in strategy of tactics exists" for choosing to proceed on the amended indictment, or that "no reasonable trial counsel" would have made the choice to demand the additional ten days to prepare and proceed without further delay. Moreover, there is no showing of a reasonable probability that the result of the proceeding would have been

different had Appellant's counsel objected. There is no reason to believe that an objection would have resulted in anything but a delay in the proceedings.

Appellant's trial counsel effectively argued against the State's case. In closing argument, Appellant's counsel pointed out:

- CNM's testimony that she had been at the Mockingbird Street house for several days conflicted with that of Sylvia Brown, who testified that she arrived after midnight the evening before; (RR5: 201)
- Officer Payne testified that the man on the mattress was not Appellant, but Sylvia Brown testified that it was; (RR5: 202)
- CNM testified that two black males were still in the residence, but Officer Payne saw only one; (RR5: 202)
- CNM never reported to her father or to police that Patricia Markham was also involved in the assault; (RR5: 202)
- CNM admitted in her testimony that she was on crack cocaine and "messed up": (RR5: 202-203)
- CNM's testimony that she was naked in the bed contradicted Officer Payne's testimony that she was dressed; (RR5: 203-204)

- Officer Payne testified that he went to the bedroom door and saw CNM, but she testified that he never did; (RR5: 203-204)
- Officer Payne testified that CNM did not want to leave with her father. (RR5: 204)

Taken as a whole, Appellant's counsel provided effective and competent representation.

Response to Issue Two

> **There is no error when a defendant proceeds under an amended indictment without objection. No court has held that Tex. Code Crim. Proc. Ann. art. 28.10 is unconstitutional in allowing the amendment of an indictment without the authorization of the grand jury.**

Argument and Analysis

Appellant argues that his convictions are void because they were not presented to the grand jury in violation of Texas Const. Article I, § 10. No court has held that Tex. Code Crim. Proc. Ann. art. 28.10 is unconstitutional in allowing the amendment of an indictment without the authorization of the grand jury. *See Batiste v. State,* 785 S.W.2d 432 (Tex. App.—Corpus Christi 1990, pet. ref'd) (holding that Tex. Code Crim. Proc. Ann. art. 28.10 does not violate Texas Const. Article I, § 10). No objection by Appellant to proceeding under Article 28.10(c) appears on the record.

Appellant's counsel demanded and received ten additional days to prepare for trial. Appellant testified that he was aware that the indictment was amended when Appellant's counsel visited him in jail prior to trial, then backtracked on that testimony and stated that he did not know about the amendments prior to trial. (Supp. RR3: 21-22) Defendant pleaded not guilty to all four counts as each was read individually in open court. (RR2: 11-12) There is no constitutional violation.

PRAYER

The State requests this Court affirm the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Britt Lindsey, affirm that the above brief is in compliance with the Rules of Appellate Procedure. The font size in the brief is 14 point, except footnotes which are 12 point. The word count is 10,248 excluding the exceptions listed in Rule 9.4.

/s/ Britt Lindsey_____
BRITT LINDSEY

CERTIFICATE OF SERVICE

I certify that on this 22nd day of October, 2019, a true copy of the foregoing State's Brief was served on the Attorney for Appellant and on Appellant according to the requirements of law by efiling.

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